Supreme Court, U.S.
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IN THE
Supreme Court of the United States
October Term, 1992

SHEET METAL WORKERS UNION LOCAL 38 INSURANCE AND WELFARE FUND; SHEET METAL WORKERS UNION LOCAL 38 PENSION FUND; SHEET METAL WORKERS UNION LOCAL 38 VACATION FUND; SHEET METAL WORKERS UNION LOCAL 38 ANNUITY FUND; WILLIAM R. PAGANO, As Participant, Beneficiary and Trustee of Sheet Metal Workers Union Local 38 Insurance and Welfare Fund, Pension Fund, Vacation Fund, and Annuity Fund,

Petitioners,

-against-

AETNA CASUALTY AND SURETY COMPANY,

Respondent.

AETNA CASUALTY AND SURETY COMPANY,

Third-Party Plaintiff,

-against-

MARTIN J. SCHWIMMER, MARIO RENDA, JOSEPH DeCARLO, SR. and FIRST UNITED FUNDS, LTD.,

Third-Party Defendants.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR WRIT OF CERTIORARI

JOHN J. HANNAWAY
51 Madison Avenue, Suite 3003
New York, New York 10010
(212) 545-7800
Counsel of Record and
Attorney for Petitioner

Of Counsel:
JEFFREY M. DUBAN

Dick Bailey Appellate Printers ► Tel.: 1-800-564-4918 ◄
(212) 608-7666 — (718) 447-5358 — (516) 222-2470 — (914) 682-0848
Fax Number: (718) 273-8031

QUESTIONS PRESENTED

I. Do the provisions of the Employee Retirement Income Security Act of 1974, 29 U.S.C. §1001 et seq. ("ERISA") supersede the contractual provisions of a fidelity bond required by ERISA?

II. Should the parties to a fidelity bond issued pursuant to the requirements of ERISA be allowed to contract out of the otherwise applicable limitations period?

III. What is the statute of limitations for a claim made on a fidelity bond required by ERISA?

PARTIES

In addition to the parties whose names appear in the caption, a copy of the summons and complaint were served, as required by 29 U.S.C. §1132(h), on the Secretary of Labor and the Secretary of the Treasury, neither of whom has intervened in the action.

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In The

SUPREME COURT OF THE UNITED STATES

October Term, 1992

SHEET METAL WORKERS UNION LOCAL 38 INSURANCE AND WELFARE FUND; SHEET METAL WORKERS UNION LOCAL 38 PENSION FUND; SHEET METAL WORKERS UNION LOCAL 38 VACATION FUND; SHEET METAL WORKERS UNION LOCAL 38 ANNUITY FUND; WILLIAM R. PAGANO, As Participant, Beneficiary and Trustee of Sheet Metal Workers Union Local 38 Insurance and Welfare Fund, Pension Fund, Vacation Fund, and Annuity Fund,

Petitioners,

- against -

AETNA CASUALTY AND SURETY COMPANY,

Respondent.

AETNA CASUALTY AND SURETY COMPANY

Third-Party Plaintiff,

- against -

MARTIN J. SCHWIMMER, MARIO RENDA, JOSEPH DeCARLO, SR. and FIRST UNITED FUNDS, LTD.,

Third-Party Defendants.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioners respectfully pray that a writ of certiorari issue to review the summary judgment and opinion of the United States Court of Appeals for the Second Circuit entered in this proceeding on May 28, 1992.

OPINIONS BELOW

The opinion of the Court of Appeals for the Second Circuit, annexed hereto as "Appendix A", was issued as a summary order and, pursuant to Local Rule 0.23 of that Court, will not be officially reported. The opinion of the United States District Court for the Southern District of New York (Broderick, J.) is not officially reported and appears as Appendix B hereto at 4a.

JURISDICTION

The judgment of the Court of Appeals for the Second Circuit, dated May 29, 1992 was entered on May 28, 1992.

Petitioner invokes the jurisdiction of the Supreme Court under 28 U.S.C. §1254 (1).

STATUTES INVOLVED

The case involves §412 of the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. §1112, which requires ERISA fiduciaries to be bonded, and the statutes of limitations that are contained in ERISA §§413 and 1303(f)(5), 29 U.S.C. §§1113 and 1451(f)(5). The text of these statutory sections is set out in the Appendix.

The decision below applied New York law which, under New York Civil Practice Law and Rules (McKinney's) §201, allows the parties to agree in writing to shorten the otherwise applicable state law statute of limitations. That state statutory period would in this case be the six-year period for breach of contract claims contained in New York Civil Practice Law and Rules (McKinney's) §213(2). The text of these statutory sections is also set out in the Appendix.

STATEMENT OF THE CASE

The issue here directly affects every benefit plan subject to ERISA: whether the protections mandated by the requirement of ERISA §412, 29 U.S.C. §1112, that all plan fiduciaries be

bonded, can be subverted by a contract between the bonded fiduciaries and the surety which shortens the time within which to commence an action on the bond to less than the time otherwise allowed under the applicable statute.

The Court of Appeals for the Second Circuit, by affirming the opinion of the District Court that the parties to an ERISA-mandated fidelity bond could contract out of the statute and could enforce the shorter limitations period contained in a standard form insurance company bond, diminished the protections intended by ERISA for every plan subject to that statute. By allowing the very fiduciaries whose actions are being bonded to contract with a bonding company in such a way as to decrease the protections mandated by ERISA, the Court of Appeals jeopardized the protections

granted by ERISA against breach of fiduciary duty.

If the parties to an ERISA-mandated fidelity bond can shorten the time for bringing suit on the bond, the parties are subjecting the protections provided by ERISA to the terms of a standard form adhesion contract and are, in effect, amending the statute.

Since every ERISA plan has a fidelity bond, typically a standard form insurance company bond that contains a short limitations period, the issue here is important to the beneficiaries of every benefit plan subject to ERISA.

A. Jurisdiction in the Prior Proceedings

The District Court had jurisdiction pursuant to 28 U.S.C. §§1331 and 1352 because this is an action pursuant to 29

U.S.C. §§1113 and 1132 for payment under a bond required by 29 U.S.C. §1112.

The District Court also had diversity jurisdiction pursuant to 28 U.S.C. §1332(a) because plaintiffs are citizens of New York and defendant is a citizen is of Connecticut.

The Court of Appeals had jurisdiction pursuant to 28 U.S.C. §1291.

B. Nature of the Case

This is an action by Petitioners ("the Funds") for payment under a fidelity bond ("the Bond") for losses suffered as a result of breach of fiduciary duty by the investment advisor to the Funds, Martin J. Schwimmer ("Schwimmer"). The Funds are multi-employer benefit plans, as that term is defined in ERISA.

As a result of criminal activity of Schwimmer, the Funds suffered losses of at least $3,877,170.85 under the Bond, for which the Funds made a claim to the bonding company, The Aetna Casualty and Surety Company ("Aetna"), which failed to pay the claim.

C. **Course of Proceedings**

The Funds commenced this action on the Bond against Aetna on November 29, 1989. Aetna served an answer and an amended answer that denied coverage and asserted affirmative defenses. Aetna also filed a third party complaint asserting indemnity claims against Schwimmer, Mario Renda ("Renda") and Joseph DeCarlo, Sr., who were individuals associated with Schwimmer, and against entities with which they were associated,

namely, First United Fund, Ltd. and First United Financial Corp.

By order dated April 8, 1991, the District Court for the Southern District of New York (Broderick, J.) granted Aetna's motion for summary judgment on the ground that the action was barred by the two-year limitations period contained in the Bond. By further order of October 18, 1991, the District Court directed on the basis of its April 8, 1991 order that final judgment be entered in favor of Aetna and dismissed Aetna's third-party claim as moot. Judgment dismissing the third-party complaint was entered on October 21, 1991, and an amended judgment was entered on November 26, 1991 dismissing the complaint and third-party complaint.

The Court of Appeals for the Second Circuit in a summary order affirmed the

judgment of the District Court "substantially for the reasons set forth in Judge Broderick's order of October 18, 1991." The Court of Appeals apparently was referring to the District Court's April 8, 1991 order.

D. **Statement of Facts**

The Funds obtained the Bond pursuant to ERISA requirements that every fiduciary of an employee benefit plan and every person who handles funds or other property of such a plan be bonded in an amount to be fixed at the beginning of each fiscal year of the plan. 29 U.S.C. §1112. Schwimmer, who was the investment advisor of the Funds, was one of the individuals required by ERISA to be bonded.

On June 15, 1987, Schwimmer and Renda were indicted on various criminal offenses relating to fraud involving the

assets of the Funds and of pension and welfare funds of another union. By letter dated June 17, 1987, the Funds advised Aetna of their claim under the Bond.

In May 1988, Renda entered into a plea agreement with the Government, whereby he entered a guilty plea to certain charges against him. In October 1988, Schwimmer was convicted after a jury trial of the majority of the charges against him.

Section 8 of the Bond contains a two-year limitations period commencing when the insured discovers loss under the Bond, and a subordination of the Bond's limitations provision to any controlling statutory provision. The Bond provides in relevant part:

> No action shall lie against the Company unless, as a condition precedent thereto, there shall have been full compliance with all the

> terms of this Policy, nor until ninety days after the required proofs of loss have been filed with the Company, nor at all unless commenced within two years from the date when the Insured discovers the loss. If any limitation of time for notice of loss or any legal proceeding herein contained is shorter than that permitted to be fixed by agreement under any statute controlling the construction of this Policy, the shortest permissible statutory limitation of time shall govern and shall supersede the time limitation herein stated.

The Court of Appeals affirmed the District Court's ruling that the Funds had discovered the loss by June 1987, approximately two years and five months before the action was commenced, and that therefore the action was barred by the two-year limitation set forth in the Bond.

REASONS FOR GRANTING THE WRIT

I. THE COURT OF APPEALS FAILED TO RECOGNIZE THE "BLACK LETTER LAW" THAT BECAUSE THE BOND WAS REQUIRED BY STATUTE, THE PROVISIONS OF THAT STATUTE ARE INCORPORATED INTO THE BOND AND SUPERSEDE ANY CONFLICTING PROVISION OF THE BOND, INCLUDING A SHORTER LIMITATIONS PERIOD.

ERISA §412 (29 U.S.C. §1112) requires that all employee benefit plans subject to ERISA, in order to protect the interests of their beneficiaries and participants, purchase a bond for fiduciaries and other persons handling funds or property of the plan. The Funds purchased the Bond to comply with ERISA, and the Bond, which was a standard form bond, made specific reference to ERISA in several endorsements.

Thus, since the Bond was required by statute, the provisions of the statute must be read into the Bond. The Bond, since required by ERISA, was subject to ERISA.

It is "black letter law" that parties to a statutory bond are presumed to have contracted in such a way as to make the statutory provisions a part thereof. An insurance policy must be read in light of such statute, particularly where the statute and the policy appear to conflict. In such a case, the statute controls over any provision of the policy, as conflicting contractual provisions are void.

> The statutory law in force and effect at the time of the issuance of a policy becomes a part of the contract as though expressly written therein, and a policy must be considered to contain those requirements.

12 Appleman, Insurance Law and Practice, §7041 at 166, 180-182; see also, American Casualty Co. of Reading, Penn. v. Irvin, 426 F.2d 647, 650 (5th Cir. 1970); Dixie v. Federal Compress & Warehouse Co., 132 F.2d 275 (8th Cir.

1942) (regulations promulgated pursuant to United States Warehouse Act, 7 U.S.C. §268).

Thus, in Hack v. American Surety Co. of New York, 96 F.2d 939 (7th Cir. 1938), cert. denied, 305 U.S. 631, 59 S.Ct. 95, 83 L.Ed.2d 405, reh. denied, 305 U.S. 671, 59 S.Ct. 145, 83 L.Ed.2d 435 (1938), the Court held that an Indiana statute requiring the bonding of bank officers became part of the bond and that the statutory limitations period prevailed over a shorter period set forth in the contract.

> [T]he statute, rather than the restricted written contract of the parties, measures the liability of the surety. . . . This also applies to the efforts of the surety to restrict its said liability by fixing a time limit within which an action must be instituted. The Indiana statute of limitations, not the shorter period specified in the

> contract, must govern the time within which an action shall be brought . . . .

96 F.2d at 944.

Under New York law (which would govern a claim under the Bond, absent ERISA), it is clear that a statutory bond must be read as subject to the statutory requirements pursuant to which it was issued. Proc v. Home Insurance Company, 17 N.Y.2d 239, 270 N.Y.S.2d 412, 217 N.E.2d 136 (1966) (statutorily mandated limitation supersedes period set forth in insurance policy); see, Fox-Knapp, Inc. v. Employees Mutual Casualty Company, 725 F. Supp. 706, 709-710 (S.D.N.Y.), affd., 893 F.2d 14 (2d Cir. 1989) (statutory limitations period supersedes one year contractual limitation in fire insurance policy); Kahn v. Lumberman's Mutual Casualty Co., 293 F. Supp. 985, 989 (E.D.N.Y. 1968) (one year statutory

limitation deemed included in binder of insurance upon which suit was brought).

For non-statutory bonds, as for other contracts, New York allows the parties to agree in writing to a shorter limitations period. New York CPLR (McKinney's) §201.

The Second Circuit erred in affirming the District Court's holding that: "[t]he fact that Aetna's policy was issued to satisfy certain statutory requirements of ERISA does not preclude the enforcement of Aetna's two-year contractual limitations period." Rather, it is precisely because "Aetna's policy was issued to satisfy certain statutory requirements of ERISA" that ERISA is incorporated into and made part of the Bond. Terms of the Bond that are in conflict with the statute are superseded.

Whether, in actions brought with

respect to a breach of fiduciary duty under ERISA, the Court should look to New York law and its six-year limitations period for breach of contract actions or, as the Funds urge, infra, look directly to ERISA for the more appropriate and uniform limitations period (here also, six years), the action was brought timely.

With respect to the bond required by ERISA, the Court of Appeals for the Ninth Circuit has stated that "ERISA law controls." Kennedy v. Allied Mutual Insurance Co., 952 F.2d 262, 264 n.2 (9th Cir. 1991). Here, however, the Second Circuit has summarily dismissed such a claim, paying no heed to the ERISA nature of the claim. This Court should speak on the matter, and correct the Second Circuit's error in affirming the District Court's order of summary judgment based

on the limitations period set forth in the Bond.

II. PARTIES TO AN ERISA-MANDATED FIDELITY BOND SHOULD NOT BE ALLOWED TO DIMINISH THE PROTECTION AFFORDED BY ERISA BY CONTRACTING OUT OF THE LIMITATIONS PERIOD APPLICABLE UNDER THE STATUTE

As set forth above, parties to a statutory bond may not contract out of the statute, and are bound by the limitations period required under the statute. The present action is apparently the first instance wherein the issue has arisen in the context of ERISA. But see, Isola v. Hutchinson, 780 F. Supp. 1299 (N.D. Cal. 1991) (pension plan participant may sue non-fiduciary insurer for performance under a bond required by ERISA).

Given the broad mandate of ERISA and the strong public policies enunciated therein, it is especially appropriate

that individuals not be allowed to circumvent or, in effect, "amend" the statute by contracting out of it.

The question simply put is whether an insurer in a contract of adhesion should be allowed to "contract" the parties out of ERISA by significantly foreshortening the period in which its own obligations may be invoked. The answer must be no where, as here, such action substantially impairs the protections which Congress intended for employee benefit recipients.

The present issue goes to the core of the protections mandated by ERISA and affects every ERISA-regulated plan. This is not an action by an individual employee for increased benefits. It is an action on behalf of multi-employer funds for the benefit of the entire employee benefits plan. The Funds seek

payment from an ERISA-mandated surety. To allow that surety to contract out of its obligations is repugnant to statutory intent.

Thus, in Central States, Southeast and Southwest Areas Pension Fund v. Aalco Express Co., 592 F. Supp. 664 (E.D. Mo. 1984), the Court refused to enforce a choice of law clause in a pension trust agreement. The Court stated that the limitations period is to be found as "a matter of federal law." The court did not reach the issue of "whether the parties to a collective bargaining agreement or a pension trust agreement can, as a matter of federal labor law, provide expressly for a particular period of limitations" Central States, supra, 592 F. Supp. at 667. Similarly, the Court in Bologna v. NMU Pension Trust of NMU Pension and Welfare Plan, 654 F.

Supp. 637 (S.D.N.Y. 1987) did not enforce a limitations period adopted by the trustees as a procedural rule. But see, Scheirer v. NMU Pension and Welfare Plan, 585 F. Supp. 76 (S.D.N.Y. 1984).

In Plazzo v. Nationwide Mut. Ins. Co., 697 F. Supp. 1437 (N.D. Ohio 1988), revd. on other grounds, 892 F.2d 79 (6th Cir. 1989) (unpublished), on a claim for employee benefits under 29 U.S.C. §1132, the court looked to Ohio law for the limitations period, but refused to enforce a contract provision that would have shortened the applicable statute of limitations, even though Ohio case law allowed parties to an insurance contract to set a shorter, reasonable limitations period.

> Those state courts which have addressed the issue of whether parties may modify a state statute of limitations by a mutually agreed upon contract provision did not reach their conclusions with

> national interests in mind. It is the duty of the federal courts to assure that the importation of state law will not interfere with or frustrate the implementation of national policies. Occidental Life Insurance Co. v. EEOC, 432 U.S. 355, 367, 97 S.Ct. 2447, 2455, 53 L.Ed.2d 402 (1977), quoting Johnson v. Railway Express Agency, Inc., 421 U.S. 454, 465, 95 S.Ct. 1716, 1722, 44 L.Ed. 2d 295 (1965).

697 F. Supp. at 1441 Somewhat illogically, the Plazzo court might have enforced a contractual modification of the limitations period if Ohio had a statute rather than decisional law that allowed such modification. Plazzo, supra at 1441.

In analogous situations, courts have not allowed parties to contract away benefits provided by ERISA. Thus, in Seamon v. Vaughan, 921 F.2d 1217 (11th Cir. 1991), a breach of contract suit by trustees against a plan administrator, the Court held that a contractual term

precluding a claim for attorneys fees is preempted by ERISA.

Similarly, marital property settlement agreements have not been enforced as regards ERISA benefits, unless the agreement satisfies the requirements for the statutory exception as a "qualified domestic relations order" under 29 U.S.C. §1056(d)(3)(B)(i). McMillan v. Parrott, 913 F.2d 310, 312 (6th Cir.1990) (divorce decree ineffective to modify the beneficiary interest of participant's ex-wife); Lyman Lumber Co. v. Hill, 877 F.2d 692 (8th Cir. 1989) (id.). Cf. Carland v. Metropolitan Life Insurance Co., 935 F.2d 1114 (10th Cir. 1991), cert. denied, ___ U.S. ___, 112 S.Ct. 670 (1991). But see, Fox Valley and Vic. Const. Wkrs. Pension F. v. Brown, 897 F.2d 275, 280 (7th Cir.) (en banc), cert. denied, Brown, Laurine

v. Fox Valley, etc., et. al., ___ U.S. ___, 111 S.Ct. 67, 112 L.Ed.2d 41 (1990) (proper waiver in marital property settlement of interest by non-participant in a plan is not preempted by ERISA's anti-alienation provisions.)

A number of Circuits have similarly found to be unenforceable, as preempted by ERISA's requirement that pension plans be in writing, oral agreements by an employer to pay pension related benefits supplementary to those provided for under the company pension plan.[1] Smith v. Dunham-Bush, Inc., ___ F.2d ___, 1992 App. LEXIS 2945 (2d Cir. 1992); see, Cefalu v. B.F. Goodrich, Co., 871 F.2d 1290, 1297 (5th Cir. 1989); Degan v. Ford Motor Co., 869 F.2d 889, 895 (5th Cir.

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1 Informal written amendments of ERISA plans are expressly forbidden by 29 U.S.C. §1102(b)(3).

1989); Musto V. American General Corp., 861 F.2d 897, 910 (6th Cir. 1988), cert. denied, 490 U.S. 1020, 109 S.Ct. 1745, 104 L.Ed.2d 182 (1989); Straub v. Western Union Telegraph Co., 851 F.2d 1262, 1265 (10th Cir. 1988); Nachwalter v. Christie, 805 F.2d 956, 960 (11th Cir. 1986).

Clearly, statutory language and case law have allowed parties to "contract out" of the statute only in restricted circumstances, and only when the contract furthers, rather than impedes, the purposes of the statute. Bird v. Shearson Lehman/American Express, 926 F.2d 116 (2d Cir.) cert. denied, ___ U.S. __, 111 S.Ct. 2891 (1991) (agreement to arbitrate is not preempted; arbitration is not inconsistent with ERISA's purposes, and the agreement to arbitrate does not diminish rights provided in the

statute but only submits their resolution to the arbitration forum.)

Here by contrast, the Bond, by shortening the limitations period, diminishes the protection that ERISA intended for plan beneficiaries against breaches of fiduciary duty. Moreover, those beneficiaries are not even parties to the contract at issue--the Bond--whose very purpose is to protect them against the acts of those who <u>are</u> parties to the Bond, namely the fiduciaries.

How much more compelling it is, then, that parties to a contract (such as fiduciaries and insurance companies) be precluded from contracting away the protections ERISA provides to <u>non</u>-parties to the contract (such as plan beneficiaries) especially where, as here, the statutory protection is protection

against the acts of parties to the Bond, namely the fiduciaries.

III. THIS ACTION IS GOVERNED BY THE SIX-YEAR STATUTE OF LIMITATIONS IN ERISA §413, 29 U.S.C. §1113, BECAUSE THE FUNDS' CLAIM ON THE FIDELITY BOND IS A CLAIM "WITH RESPECT TO" A VIOLATION OF FIDUCIARY DUTY.

ERISA §413, 29 U.S.C. §1113, provides that the statute of limitations therein applies in two types of situations: 1) breaches of duty by a fiduciary or 2) other claims with respect to violations of fiduciary responsibility.

The statute thus clearly reaches past "fiduciary duty" to apply, by its terms, to actions "with respect to a violation of" fiduciary duty. Although most actions under 29 U.S.C. §1113 are brought against a breaching fiduciary, a claim under that statute against an issuer of a bond pursuant to 29 U.S.C.

§1112 is proper. Alleyne v. McCusker, 5 E.B.C. 1650 (C.D. Cal. 1983). See, Kennedy v. Allied Mutual Insurance Co., 952 F.2d 262 (9th Cir. 1991) supra; Isola v. Hutchinson, 780 F. Supp. 1299 (N.D. Cal. 1991), supra; Rochester Radiology Associates v. Aetna Life Ins., 616 F. Supp. 985 (W.D.N.Y. 1985).

Similarly, in Robinson v. Weir, 277 F. Supp. 581 (D. Neb. 1966), the Court held, in an action for breach of fiduciary duty under Section 501(b) of the Labor-Management Reporting and Disclosure Act of 1959 (29 U.S.C. §501(b)), that the surety bonding the fiduciary pursuant to 29 U.S.C. §502 may be joined as a defendant, so as to allow the "complete and appropriate relief" that Congress intended.

The present claim, made pursuant to an ERISA-mandated fidelity bond, is made

"with respect to [Schwimmer's] violation of" his fiduciary duty, and the claim is governed by the six-year statute of limitations set forth in ERISA §413, 29 U.S.C. §1113.

There has apparently been no previous instance in which a court has addressed the issue of the limitations period applicable to a fidelity bond required by ERISA §412, 29 U.S.C. §1112. Nor, apparently, has any court interpreted the phrase "with respect to" in ERISA §413, 29 U.S.C. §1113. But see, Wright v. Southwestern Bell Telephone Company, 925 F.2d 1288, 1290 (10th Cir. 1991)(§1113 does not apply to a claim for disability benefits. It is applicable only to actions "arising out of" violations of the portion of the Act addressing fiduciary responsibilities or claims that "involve" fiduciary

responsibilities). However, the broad mandate of ERISA, and the policy underlying both the statute in general and the specific requirement that fiduciaries be bonded all argue for an inclusive reading of the statute, so that employee benefit funds achieve the protection intended for them.

Here, the limitations period should be the same for the fidelity bond as for the underlying fiduciary breach. The insured's rights are protected, consistent with congressional intent, only if the limitation for suit on the bond is coextensive with that for suit against the bonded fiduciary. The rights embodied in both suits are part of an overall integral claim. The goal of fairly protecting the employee funds will best be met by a rule which subjects both the fidelity insurer and breaching

fiduciary to an equal period of vulnerability.

The purposes of ERISA can best be effected by finding that the Funds' claim on the Bond is a claim "with respect to" Schwimmer's breach of his fiduciary duty and hence is subject to the six-year statute of limitations contained in ERISA §413, 29 U.S.C. §1113.

IV. THE PRESENT ACTION PROVIDES THE COURT WITH AN OPPORTUNITY TO DELINEATE THE EXTENT TO WHICH THE PUBLIC POLICIES EMBODIED IN ERISA REQUIRE THAT ACTIONS BROUGHT UNDER ERISA SHOULD BE SUBJECT TO UNIFORMITY IN STATUTES OF LIMITATIONS

A. If the Court Finds no Limitations Period in ERISA That Explicitly Applies Here and Hence "Borrows" the "Most Suitable" Limitations Period From Elsewhere in Federal or State Law, That "Borrowing" Should not Allow the Parties to Contract Out of a Statutory Limitations Period

With four exceptions, ERISA does not explicitly provide a limitations period

for suits brought to enforce its provisions. The exceptions are: actions with respect to fiduciary responsibility (29 U.S.C. §1113), actions relating to termination of a single employer plan (29 U.S.C. §1370(f)), actions by or against the Pension Benefit Guaranty Corporation (29 U.S.C. §1303(e)(6), 29 U.S.C. §1303 (f)(5) and 29 U.S.C. §1368(d)(2)) and actions under the special provisions relating to multi-employer plans (29 U.S.C. §1451(f)).

The legislative history of ERISA indicates that actions brought under 29 U.S.C. §1132, ERISA's general enforcement provision, are to be regarded as arising under the laws of the United States in similar fashion as those brought under §301 of the Labor Management Relations Act of 1947 (LMRA), 29 U.S.C. §301. Metropolitan Life Ins. Co. v. Taylor, 481

U.S. 58, 66, 107 S.Ct. 1542, 95 L.Ed.2d 55 (1987).

Because §301 does not itself specify a limitations period, the court's task is to "'borrow' the most suitable statute or other rule of timeliness from some other source." DelCostello v. International Brotherhood of Teamsters, 462 U.S. 151, 158, 103 S.Ct. 2281, 2287, 76 L.Ed.2d 476 (1983).

The present action provides the Court, in the context of a situation that is present in every ERISA plan, an opportunity to state what limitations period must be "borrowed" and from where.

Is an action on a fidelity bond sufficiently related to an action against the bonded fiduciary as to make 29 U.S.C. §1113 directly applicable, obviating the need for "borrowing"? Or is such an action, at least in the context of multi-

employer plans, directly akin to an action by trustees for "appropriate legal or equitable relief, or both" under 29 U.S.C. §1451(a)(1), so as to make the limitations period in 29 U.S.C. §1451(f)(1) directly applicable. See, Held v. Manufacturers Hanover Leasing Corp., 912 F.2d 1197, 1201 n.4 (10th Cir. 1990).

On the other hand, if the Court is to look to state law, what is the appropriate statute of limitations? In contract actions brought under 29 U.S.C. §1132, courts have generally applied a state limitations statute, see e.g., Miles v. New York State Teamsters Conference Pension & Retirement Fund Employee Pension Benefit Plan, 698 F.2d 593 (2d Cir.), cert. denied, 464 U.S. 829, 104 S.Ct. 105, 78 L.Ed.2d 108 (1983) (New York's six-year limitations period

of CPLR §213 applied to claim by five individuals for pension benefits.) Should the Court also "borrow" a state law such as New York Civil Practice Law and Rules §201 that allows the parties to contract out of that state limitations period?

This Court has long held that a state law limitations period, much less a provision allowing that the parties to contract out of that limitations period, should not be applied if to do so would frustrate or interfere with the implementation of national policies. DelCostello, supra, 462 U.S. at 161, quoting, Occidental Life Ins. Co. v. EEOC, 432 U.S. 355, 367, 97 S.Ct. 2447, 53 L.Ed.2d 402 (1977), quoting, Johnson v. Railway Express Agency, Inc., 421 U.S. 454, 465, 78 S.Ct. 1201, 2 L.Ed.2d 1972 (1965). DelCostello involved LMRA §301

and hence involved federal policies akin to ERISA's concerns for employees and their benefits.

However, New York's grant of authority to contracting parties to "customize" or "individualize" the limitations period, was clearly made without reference to ERISA and the national policies embodied in that statute.

The requirement that fiduciaries be bonded is for the purpose of protecting the assets of employee benefit plans. A rule that would allow those fiduciaries to contract away that protection should be found contrary to the protective mandate of ERISA.

The Court of Appeals allowed the parties here to adopt, not an explicit state statute of limitations, but a contract clause that would reduce the

uniformity factor to zero, allow an insurance company to impose whatever limitations period appears in its standard form fidelity bond, and increase potential abuses and procedural disputes in any litigation, all undermining and frustrating the prompt and efficient resolution of claims in this area of paramount federal concern.

The Court of Appeals ruling also interfered with the strong federal policy of safeguarding the financial integrity of pension funds. The federal government, specifically the Pension Benefit Guaranty Corporation, will ultimately be liable for the payment of vested benefits if a pension plan is not adequately funded and terminates. Where the choice exists, actions involving trust funds should be given a longer rather than a shorter limitations period.

Vernau v. Vic's Market, Inc., 896 F.2d 43, 45 n.3 (3rd Cir. 1990); Hawaii Carpenters v. Waiola Carpenter Shop, Inc., 823 F.2d 289, 298 (9th Cir. 1987).

Even if ERISA §413, 29 U.S.C. §1113, does not by its terms apply here, the proper procedure is to borrow the "most suitable" statute of limitations. DelCostello, supra, 462 U.S. at 158. There is nothing "suitable," in an area of overriding federal interest and broad preemption, in borrowing a contractual provision that shortens the liability period of the insurance company, especially where the contract is a standard form contract of adhesion, imposed by the insurance company or, at best, "negotiated" between the insurance company and the very fiduciaries whose conduct is being insured against.

B. The Scope of ERISA's Provisions Shows That ERISA's Mandated Uniformity and Predictability Are No Less Served by the Preemption of State Statutes of Limitation Than By the Preemption of State Law in Other Respects.

The present action further allows the Court to address the extent to which ERISA's preemption of pension law precludes borrowing a state limitations period.

The "preemption" here involved is not the preemption of a state law cause of action, but rather the equally dispositive preemption of a state law that allows contracting parties to amend ERISA.

As this Court has emphasized, "'The preemption clause is conspicuous for its breadth'. . . . Its 'deliberately expansive' language was 'designed to "establish pension plan regulation as

exclusively a federal concern."'"

Ingersoll-Rand Co. v. McClendon, ___ U.S. ___, 111 S.Ct. 478, 482, 112 L.Ed.2d 474 (1990) (citations omitted).

> . . . Section 514(a) was intended to ensure that plans and plan sponsors would be subject to a uniform body of benefit law; the goal was to minimize the administrative and financial burden of complying with conflicting directives among States or between States and the Federal Government. Otherwise, the inefficiencies created could work to the detriment of plan beneficiaries.

111 S.Ct. at 484 (citations omitted).

ERISA is a statute with "unique preemptive force." Metropolitan, supra, 481 U.S. at 65, and the Second Circuit has recently stated that, "Congress intended the statute to avert a 'patchwork scheme of [state] regulation,'" Smith v. Dunham-Bush, Inc., ___ F.2d ___, 1992 App. LEXIS 2945

(2d Cir. 1992). Accordingly, a uniform ERISA statute of limitations, reducing the disruptive potential for conflicting regulatory provisions, would advance the pervasive uniformity which Congress' preemptive mandate intended for ERISA.

In another area in which federal regulation is pervasive, viz., securities law, this Court has recently reiterated that, in certain situations, the court should impose a uniform federal limitations period. In Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson, ___ U.S. __, 111 S.Ct. 2773, 115 L.Ed.2d 321 (1991), Justice Blackmun stated:

> We have recognized that a state legislature rarely enacts a limitations period with federal interests in mind, . . . and when the operation of a state limitations period would frustrate the policies embraced by the federal enactment, this Court has looked to federal law for a suitable period. . . . These departures from the state-borrowing doctrine have been motivated by this Court's conclusion that it would be

> "inappropriate to conclude that Congress would choose to adopt state rules at odds with the purpose or operation of federal substantive law."

111 S.Ct. at 2778. (Although seven Justices (two in dissent) agreed that there should be a uniform federal limitations period, only four Justices joined in that part of Justice Blackmun's opinion quoted above).

The same policy considerations are present here as were present in Lampf, supra. Anything less than a uniform ERISA statute of limitations for actions brought on an ERISA-required bond, would frustrate congressional intent, giving rise to the evils which Congress sought to avoid. First, pension fund members, the intended beneficiaries of the ERISA bond, could be prejudiced by contractual agreements between the insurer and the bonded fiduciary to foreshorten

limitations periods. Second, in multi-state situations, courts have to decide which state to look to for applicable law. Third, absence of a uniform ERISA limitation burdens courts with the repeated task of claim analysis and characterization in selecting one of any number of proffered state statutes of limitation as being most analogous.

ERISA should be broadly applied to preempt state limitation periods no less than state law in other respects. A fortiori, a contractual limitation, as set forth in Aetna's standard form contract of adhesion, should be rejected as incongruent with the scope and intent of ERISA.

C. The Second Circuit's Complete Disregard of the ERISA Nature of the Present Action Conflicts With Decisions in Other Circuits on-Related Issues

The Court of Appeals for the Third Circuit has applied the limitations period of ERISA §413 in cases involving issues much further removed from a breach of fiduciary duty than the present action on a fidelity bond. In Adams v. Gould, Inc., 739 F.2d 858 (3d Cir. 1984), cert. denied, 469 U.S. 1122, 105 S.Ct. 806, 83 L.Ed.2d 799 (1985), employees sought to file a second amended complaint against their union for breach of the duty of fair representation and against their employer for breach of the collective bargaining agreement.

The Third Circuit noted that for similar claims the Supreme Court in DelCostello, supra, had emphasized the desirability of a uniform national

limitations period. The Adams Court held that, where the claim against an employer is for breach of a pension agreement, the limitations period of ERISA §413, 29 U.S.C. §1113, applied, and the employees' suit was timely. The Court stated:

> Accordingly, we hold that the three-year ERISA statute of limitations applies to this suit, in spite of the fact that the vested employees' suit against Gould's is predicated on a breach of the duty of fair representation by the Union rather than on a breach of a fiduciary duty by a pension fund trustee. Thus, the suit is not time barred.

739 F.2d at 867 (emphasis added).

Similarly, in Edwards v. Wilkes-Barre Pub. Co. Pension Trust, 757 F.2d 52 (3d Cir.), cert. denied, 474 U.S. 843, 106 S.Ct. 130, 88 L.Ed.2d 107 (1985), the Third Circuit followed Adams, supra, in an employees' suit against their employer and the pension plan to compel a recalculation of pension benefits, and

applied the ERISA statute of limitations. In so doing, the Edwards Court noted that "this case, like Adams, involves the long term interests of present beneficiaries to a pension plan, not the disputed terms of a collective bargaining agreement that affects the day-to-day operation of a business." Id. at 55.

The Adams and Edwards Courts, absent a statute of limitations directly applicable to the cases before them, see, 739 F.2d at 867 and 757 F.2d at 55, based their application of the three year ERISA limitation upon an "examin[ation] [of] the relevant policies." Adams, supra, at 867. For the Third Circuit, the controlling policy involved the "long term interests of the present beneficiaries to a pension plan," Edwards, 757 F.2d at 55, rather than matters "affect[ing] the day-to-day

operations of a business." 739 F.2d at 867 and 757 F.2d at 55.

Here, no less than in Adams and Edwards, supra, the "long term interests of the present beneficiaries to a pension plan" are at issue.

This extension by the Court of Appeals for the Third Circuit, and by courts from other Circuits that have followed Adams and Edwards, supra,[2] in

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[2] See, Smith v. ABS Industries, Inc., 653 F. Supp. 94, 101 (N.D. Ohio 1986) (following Adams) (suit alleging denial of post-retirement rights to medical and life insurance timely under 29 U.S.C. §1113); Sparks v. Ryerson & Haynes, Inc., 638 F. Supp. 56, 59-61 (E.D. Mich. 1986) (following Adams) (suit alleging plan alteration by reduction of vested rights to full medical pension payments timely under 29 U.S.C. §1113); cf. Bower v. Bunker Hill Co., 675 F. Supp. 1254, 1257 (E.D. Wash. 1986) (suit for enforcement of collectively bargained rights to medical insurance timely under either state limitation or 29 U.S.C. §1113; reasoning of Adams and Sparks "is (continued...)

applying the limitations period contained in ERISA §413, 29 U.S.C. §1113, to situations other than actions brought against fiduciaries for breach of duty, furthers the policies underlying ERISA. By contrast, the Seventh Circuit declined to follow Adams in United Ind. Flight Officers v. United Airlines, 756 F.2d 1262, 1272 (7th Cir. 1985). The Court of Appeals for the Second Circuit has here similarly frustrated ERISA's policies and should be reversed.

Other Circuit Courts, while wrestling with the desirability of imposing a uniform statute of limitations, have felt restrained by

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[2](...continued)
persuasive and fully applicable here"). But see, Central States S.E. and S.W. Areas v. Kraftco, Inc., 799 F.2d 1098, 1104 n.4 (6th Cir. 1986) (Court does not reach issue of applicability of 29 U.S.C. §1113).

their earlier decisions from doing so. Thus, in Hawaii Carpenters v. Waiola Carpenter Shop, Inc., 823 F.2d 289, 297 (9th Cir. 1987), the Ninth Circuit stated that "there are strong reasons for creating a uniform federal rule governing the limitations of actions for collection of delinquent ERISA contributions--including the fact that multi-employer trust funds may cover employers operating in a number of states..." However, the Court felt constrained by its earlier decision in Trustees for Alaska Laborers - Constr. Indust. Health & Sec. Fund v. Ferrell, 812 F.2d 512 (9th Cir. 1987) to apply a state law six-year statute of limitations to a claim for unpaid employer contributions to an ERISA fund. In doing so, the Court "note[d] especially that effectuation of federal policy is not impeded by application of a

six-year statute of limitations." 823 F.2d at 298.

Similarly, the Tenth Circuit, in an action involving a claim by an employee that he was discharged to prevent him from attaining vested rights under a retirement plan, stated:

> "Although this case arguably provides the ideal context for considering whether adoption of an ERISA limitations period makes more sense than searching for an analogous state statute, we believe that inquiry is foreclosed to this panel by this circuit's decision in Trustees of the Wyoming Laborers Health & Welfare Plan v. Morgen and Oswood Constr., Co., 850 F.2d 613 (10th Cir. 1988)"

Held v. Manufacturers Hanover Leasing Corp., 912 F.2d 1197, 1200-1201 (10th Cir. 1990). See, Gray v. Greyhound Retirement and Disability Trust, 730 F. Supp. 415, 418 (M.D. Fla. 1990) (Eleventh Circuit precedent requires application of analogous state law limitations period to an employee's claim for recalculation of

pension benefits, but argument to apply 29 U.S.C. §1113 is "appealing"; cf. Robbins v. Iowa Road Builders Co., 828 F.2d 1348, 1353 n.3 (8th Cir. 1987), cert denied, Robbins v. Easter Enterprises, Inc., 487 U.S. 1234, 108 S.Ct. 2899, 101 L.Ed 2d 933 (1988) (establishment of a uniform limitations period especially desirable where, as here, the trust agreements and administration are multi-state).

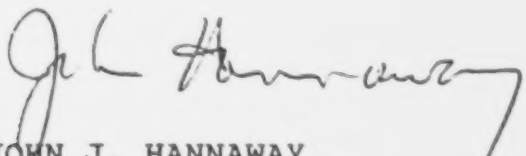
Accordingly, even absent an expressly mandated statute of limitations governing fidelity bond claims, the Court should here apply the statute of limitations in ERISA §413, 29 U.S.C. 1113, in the interest of a uniform, federal limitations period.

CONCLUSION

For the reasons herein set forth, the writ should be granted.

Dated: New York, New York
August 24, 1992

Respectfully submitted,



JOHN J. HANNAWAY
Attorney for Petitioners
and Counsel of Record
51 Madison Avenue
Suite 3003
New York, New York 10010
212-545-7800

Of Counsel:

Jeffrey M. Duban

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 29 day of May, one thousand nine hundred and ninety-two.

P r e s e n t:

HONORABLE GEORGE C. PRATT,

HONORABLE FRANK X. ALTIMARI,
Circuit Judges,

HONORABLE DANIEL M. FRIEDMAN,
Circuit Judge of the United States Court of Appeals for the Federal Circuit, sitting by designation.

Docket No. 92-7168

United States Court of Appeals
Second Court
Filed
May 28, 1992
Elaine B. Goldsmith, Clerk

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SHEET METAL WORKERS UNION LOCAL 38 INSURANCE AND WELFARE FUND; SHEET METAL WORKERS UNION LOCAL 38 PENSION FUND; SHEET METAL WORKERS UNION LOCAL 38 VACATION FUND; SHEET METAL WORKERS LOCAL 38 ANNUITY FUND; WILLIAM R. PAGANO, Participant, Beneficiary and Trustee of Sheet Metal Workers Union Local 38 Insurance and Welfare Fund, Pension Fund, Vacation Fund and Annuity Fund,

Plaintiffs-Appellants,

- against -

AETNA CASUALTY AND SURETY COMPANY,

Defendant-Appellee.

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AETNA CASUALTY AND SURETY COMPANY,

Third-Party Plaintiff,

- against -

MARTIN J. SCHWIMMER, MARIO RENDA, JOSEPH DeCARLO, SR. and FIRST UNITED FUNDS, LTD.,

Third-Party Defendants.

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This appeal from a final judgment of the United States District Court for the

Southern District of New York came on to be heard on the transcript of record and was argued by counsel.

ON CONSIDERATION WHEREOF, it is ordered, adjudged, and decreed that the judgment appealed from is hereby **AFFIRMED**, substantially for the reasons set forth in Judge Broderick's order of October 18,
1991.

/s/
George C. Platt, U.S.C.J.

/s/
Frank X. Altimari, U.S.C.J.

/s/
Daniel M. Friedman, U.S.C.J.

N.B. THIS SUMMARY ORDER WILL NOT BE PUBLISHED IN THE FEDERAL REPORTER AND SHOULD NOT BE CITED OR OTHERWISE RELIED UPON IN UNRELATED CASES BEFORE THIS OR ANY OTHER COURT.

APPENDIX B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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SHEET METAL WORKERS UNION LOCAL 38 INSURANCE AND WELFARE FUND, SHEET METAL WORKERS UNION LOCAL 38 PENSION FUND, SHEET METAL WORKERS UNION LOCAL 38 VACATION FUND, SHEET METAL WORKERS LOCAL 38 ANNUITY FUND, AND WILLIAM R. PAGANO, AS PARTICIPANT, BENEFICIARY AND TRUSTEE OF SHEET METAL WORKERS UNION LOCAL 38 INSURANCE AND WELFARE FUND, SHEET METAL WORKERS UNION LOCAL 38 PENSION FUND, SHEET METAL WORKERS UNION LOCAL 38 VACATION FUND, AND SHEET METAL WORKERS UNION LOCAL 38 ANNUITY FUND,

Plaintiffs,

- against -

THE AETNA CASUALTY AND SURETY COMPANY,

Defendant.

89 Civ. 7903(VLB)

ORDER

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THE AETNA CASUALTY AND SURETY COMPANY,

Third-Party Plaintiff,

- against -

MARTIN J. SCHWIMMER,
MARIO RENDA,
JOSEPH DeCARLO, SR. and
FIRST UNITED FUNDS, LTD.,

Third-Party Defendants.

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VINCENT L. BRODERICK, U.S.D.J.

Plaintiffs, the Sheet Metal Workers Union Local 38 Insurance and Welfare Fund, the Sheet Metal Workers Union Local 38 Pension Fund, the Sheet Metal Workers Union Local 38 Vacation Fund and the Sheet Metal Workers Union Local 38 Annuity Fund (hereinafter referred to collectively as the "Local 38 Funds") and William R. Pagano, have brought the instant action to recover from the Aetna Casualty and Surety Company ("Aetna"), pursuant to Comprehensive Dishonesty,

Disappearance and Destruction Policy - Form A, Number 74 BY 3109 BCA (the "Aetna policy"), for losses they allegedly sustained as a result of the dishonest or fraudulent acts of Martin Schwimmer ("Schwimmer").

I. Factual Summary

Aetna issued the Aetna policy to the Local 38 Funds for a policy period beginning on or about January 25, 1982 and continuing until the effective date of termination or cancellation thereof. Section 8 of the Conditions and Limitations provisions in the Aetna policy provides, inter alia, that a suit cannot be maintained against Aetna unless the action is brought within two years from the date when the Local 38 Funds discover the loss.[1]

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[1] Section 8 of the Conditions and Limitations provisions in the Aetna policy provides in pertinent part:

Schwimmer and co-defendant Mario Renda ("Renda") were indicted on June 15, 1987 of various criminal offenses relating to the investment of monies from the Local 38 Funds by a Grand Jury sitting in the United States District Court for the Eastern District of New York. A superseding indictment against Schwimmer and Renda was issued in July

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continued. . .

> No action shall lie against the Company unless, as a condition precedent thereto, there shall have been full compliance with all the terms of this Policy, nor until ninety days after the required proofs of loss have been filed with the Company, nor at all unless commenced within two years from the date when the Insured discovers the loss. If any limitation of time for notice of loss or any legal proceeding herein contained is shorter than that permitted to be fixed by agreement under statute controlled the construction of this Policy, the shortest permissible statutory limitation of time shall govern and shall supersede the time limitation herein stated.

1987, and a second superseding indictment was issued in January 1988.

In a letter of June 17, 1987, Robert Carleton ("Carleton"), the fund manager of the Local 38 Funds advised Aetna of their claim for $1,000,000. This letter represents the first notice given to Aetna by the Sheet Metal Workers Funds of the claim under the Aetna Policy.

On or about May, 1988, Renda entered into a plea agreement with the government whereby he entered a guilty plea to certain charges in the second superseding indictment. On October 28, 1988 Schwimmer was convicted by a jury of the majority of the counts of the second superseding indictment.

Prior to this conviction, on October 27, 1988, the Local 38 Funds commenced a civil action against Schwimmer and Renda alleging, inter alia, violations of the

Racketeer Influenced and Corrupt Organizations Act ("RICO"). In January, 1989, the Local 38 Funds entered into a settlement of the civil RICO action against Renda.

The Local 38 Funds provided Aetna with a "proof of loss" on February 8, 1989. In this document, the Local 38 Funds detailed their losses to be $3,871,070.85 as a result of Schwimmer's dishonest acts.

Arthur N. Lambert ("Lambert"), attorney for Aetna, in a letter of June 19, 1989, to Carleton, requested certain documents for review in order to evaluate the claim made under the Aetna policy. On September 15, 1989, Lambert wrote a follow-up letter to John J. Hannaway, counsel to the Local 38 Funds requesting documents and a meeting. Both letters concluded with a paragraph reserving

Aetna's rights and defenses under the policy.[2]

On October 23, 1989 counsel and fund manager for the Local 38 Funds met with counsel from Aetna. At that time, counsel for the Local 38 Funds executed an agreement which contained a provision which recognized that Aetna still retained its rights and defenses under the policy.[3]

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[2] The letters contained the following concluding paragraph:

> Please be advised that nothing heretofore, nor contained herein, is intended as a waiver, estoppel or modification of the terms, provisions, conditions, limitations or exclusions of Aetna's policy of insurance, all of which are expressly reserved, together with such rights and defenses as are available pursuant to the policy or by law.

[3] The provision provided:

> It is agreed and understood that any action done to date or to be done subsequently by or on behalf or either the Aetna Casualty and Surety Company or

continued. . .

Plaintiffs commenced this action on or about November 29, 1989.

Pursuant to Rule 56 of the Federal Rules of Civil Procedure, Aetna has brought a motion for summary judgment to dismiss the complaint. Aetna argues that

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the Employee of Benefit Funds of Sheet Metal Workers Local 38 ("Local 38 Funds") in connection with the claim by the Local 38 Funds under Comprehensive Dishonesty, Disappearance and Destruction Policy No. 74 BY 3109 BCA for an alleged loss sustained as the result of the acts of Martin J. Schwimmer, including but not limited to any review or investigation of the claim or the facts underlying such claim, demands for or acceptance of documentation in support of the claim, meetings regarding the claim or other action relative to said claim, shall not be construed to be an admission of liability on the claim, nor shall it be construed to waive or modify any of the terms, conditions and provisions of the policy. It is further understood that any action taken relative to the claim 2hall not constitute an estoppel or waiver of any kind, nor waive, invalidate, forfeit or modify any of the rights, remedies, liabilities or defenses which either the Aetna Casualty and Surety Company or the Local 38 Funds may have with respect to the aforesaid insurance policy claim.

the summary judgment is appropriate for two reasons: first, the Local 38 Funds' action is time barred and second, the Local 38 Funds' settlement with Renda prejudiced Aetna's subrogation rights. The Local 38 Funds have crossed moved against Aetna and have requested an order pursuant to Rule 56 of the Federal Rules of Civil Procedure granting them partial summary judgment on Aetna's statute of limitations and rights of subrogation defenses.

I grant Aetna's motion for summary judgment and deny plaintiffs' motion for partial summary judgment. This action is barred by the two-year limitations period for commencing suit pursuant to Aetna's policy. I do not reach Aetna's second ground for summary judgment.

II. This action is time-barred due to plaintiffs' failure to commence this action within the two-year limitations period prescribed by Aetna's policy.

Section 8 of Aetna's policy provides, in pertinent part, "[n]o action shall lie against the Company. . . unless commenced within two years from the date when the Insured discovers the loss. . . ." The date the insured "discovers" the loss in question is critical, as it determines when the contractual limitations period begins to run.

The Second Circuit has enunciated an objective standard to determine when a fidelity loss is "discovered." Under this standard, a loss is discovered when the insured obtains facts that would cause a reasonable person to recognize that there had been dishonesty or fraud resulting in loss. Utica Mutual Ins. Co. v. Fireman's Fund Ins. Companies, 748

F.2d 118, 121-122 (2d Cir. 1984). Mere suspicions do not constitute discovery. An insured cannot disregard the known facts. Upon learning the facts comprising the alleged dishonesty, suspicions are converted to knowledge which constitutes discovery. Id. at 123 (citing Perkins v. Clinton State Bank, 593 F.2d 327, 355 (citations omitted).

Documentary evidence submitted by Aetna demonstrates that by the summer and fall of 1986, the trustees of the Local 38 Funds had extensive information concerning Schwimmer's dishonest acts. On August 6, 1985 Aetna learned that the United States Attorney's Office was conducting an investigation of the Sheet Metal Workers Local Union 38 Insurance and Welfare Fund. Special Assistant United States Attorney Bruce Maffeo, the attorney responsible for the criminal

prosecution of Schwimmer, subpoenaed the custodian of records to produce various books and records of the Sheet Metal Workers Local Union 38 Insurance and Welfare Fund. Almost eight months later, on April 29, 1986, the Local 38 Funds were apprised that the United States Attorney's Office was conducting a criminal investigation involving possible violations of the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §1962 et. seq. The fund administrator, Carleton was subpoenaed by Special Assistant United States Attorney Bruce Maffeo to testify before the Grand Jury on May 8, 1986.

Throughout this period of time, at the board of trustee meetings for the Local 38 Funds, the trustees discussed Schwimmer's investment practices and repeatedly requested explanations from

him with respect to the investments he made and the commissions he received on behalf of the Local 38 Funds. At the board of trustees meetings for the Local 38 Funds held on July 21, 1986 and on July 29, 1986, counsel for the Local 38 Funds demanded that Schwimmer provide a letter describing his relationship with "all brokers and other intermediaries with which he is associated," in order to verify his compliance with a recent Department of Labor ("DOL") technical release.

Schwimmer's relationships with intermediaries were discussed at the meeting of the trustees of the Sheet Metal Workers Pension and Annuity Funds held on September 16, 1986. During that meeting, Schwimmer indicated that he was not in violation of the DOL's technical release and agreed to bring copies of the

actual contracts between him and the intermediaries for the trustees to review. On the same day, Schwimmer sent a letter to the trustees of the Local 38 Funds, purporting to confirm that his relation-ship with one intermediary, First United Fund, was in compliance with the terms of DOL's Technical Release 86-1.

The minutes of a joint meeting of the boards of trustees of the Local 38 Funds, held on October 6, 1986, reveal that the trustees were acutely aware of the criminal investigation of Schwimmer; many of them had been subpoenaed by the United States Attorney's Office. The minutes demonstrate that the trustees extensively discussed Schwimmer's handling of the Local 38 Funds investments.

At a meeting of the trustees of the

Sheet Metal Workers Pension and Annuity Funds held on December 18, 1986 the trustees again discussed Schwimmer's investment practices and relationships with intermediaries. At that meeting they requested a written statement setting forth Schwimmer's relationship with First United Fund.

Plaintiffs' awareness of the criminal investigation being conducted by the United States Attorney's Office, and the repeated requests by their trustees for information and assurances from Schwimmer, indicate that they had notice of Schwimmer's irregular acts with respect to the investment of the Local 38 Funds. The Grand Jury indictment of Schwimmer and Renda on June 15, 1987 was icing on the cake. The events during the summer and fall of 1986 coupled with the indictment in June of 1987 would have

caused a reasonable person to recognize that a loss occurred because of Schwimmer's dishonesty. At any rate, and even if none of the foregoing sparked plaintiffs' duty to inquire, see Security Mutual Ins. Co. of New York v. Acker-Fitzsimons Corp., 31 N.Y.2d 436, 441, 340 N.Y.S. 2d 902, 906 (1972), under the objective standard enunciated by the Second Circuit, the latest possible date upon which plaintiffs may be deemed to have discovered that alleged loss was June 17, 1987, the day the Local 38 Funds administrator notified Aetna of the alleged loss.

The Local 38 Funds attempt to defeat Aetna's summary judgment motion by arguing: 1) that a material issue of fact exists; 2) that the Employee Retirement Income Security Act of 1974, as amended ("ERISA") supplies the applicable statute

of limitations period; and 3) that Aetna waived, or is estopped from asserting, the contractual limitations period. I am not persuaded by any of these arguments.

The Local 38 Funds argue that there exists a material issue of fact as to when they had knowledge of the loss caused by Schwimmer's dishonesty. Funds administrator Carleton stated in his affidavit that neither he nor any of the trustees had any knowledge of Schwimmer's dishonesty in June, 1987" . . . apart from knowledge of the existence of the indictment." This statement is controverted by the documents submitted by the Aetna which show that the trustees and the administrator of the Local 38 Funds knew of the criminal investigations being conducted by the United States Attorney's Office. The trustees, on numerous occasions prior to June of 1987,

requested verification from Schwimmer of his practices and of the types of investments he was making in behalf of the Local 38 Funds. Thus Carleton's bare assertion is insufficient to raise a triable issue of fact as to when the alleged loss in question was discovered. Plaintiffs cannot rely upon mere surmise and conjecture to defeat a summary judgment motion. See Knight v. United States Fire Insurance Co., 804 F.2d 9, 11 (2d Cir. 1986), cert. denied, 480 U.S. 932 (1987).

The Local 38 Funds assert that Aetna's fidelity insurance policy is governed by the limitations period set forth in Section 413 of ERISA, 29 U.S.C. Section 1113, because it was issued to fulfill the requirements of section 412 of ERISA, 29 U.S.C. §1112. There is no merit to this argument.

Plaintiff incorrectly attempts to apply the limitations period set forth in section 413. The limitations periods prescribed in this section relate only to actions alleging " . . . a fiduciary's breach of any responsibility, duty or obligation under this part, or with respect to a violation of this part...." In the instant case, the Local 38 Funds seek to enforce Aetna's alleged contractual obligation to indemnify the Sheet Metal Workers Funds pursuant to an insurance policy. For ERISA section 413 to be applicable, the Local 38 Funds would have to allege a breach of duty by a fiduciary or a violation of Part 4 of ERISA, 29 U.S.C. §1101, et seq.

Section 412 of ERISA, 29 U.S.C. §1112, requires bonding of every fiduciary and of every person who handles the funds or other property of an

employee benefit plan. This statute does not prescribe a limitations period for suits to enforce provisions of fidelity bonds issued to ERISA benefit plans. The fact that Aetna's policy was issued to satisfy certain statutory requirements of ERISA does not preclude the enforcement of Aetna's two-year contractual limitations period.

The Local 38 Funds also claim that the two-year limitations period should not govern because Aetna has waived, or is estopped from raising, the limitations defense. The Local 38 Funds waiver/estoppel argument rests on the fact that Aetna did not communicate with the Local 38 Funds until after the expiration of the contractual limitations period, four months after receiving proof of loss.

For the Local 38 Funds to prevail on

their waiver/estoppel argument they must show: 1) that Aetna intentionally waived its contractual limitations period; and 2) that Aetna intentionally lulled the Local 38 Funds into inactivity. See Fox-Knapp Inc. v. Employers Mut. Cas. Co., 725 F. Supp. 706 (S.D.N.Y. 1989), aff'd, 893 F.2d 14 (2d Cir. 1989); Gilbert-Frank Corp. v. Federal Insurance Co., 70 N.Y.2d 966, 968, 525 N.Y.S.2d 793, 795, 520 N.E.2d 512, 514 (1988).

The Local 38 Funds cannot meet these requirements and thus cannot prevail on their waiver/estoppel argument. The argument is inconsistent with the non-waiver agreement executed by the plaintiffs' counsel on October 23, 1989 which specifically acknowledged that any acts done by Aetna to review the Local 38 Funds' claim, either before or after the date of the agreement, did not constitute

a waiver or estoppel which would preclude Aetna from asserting the two-year limitations period in section 8 of the Aetna policy.

Under case law an insurer's investigation of a claim pursuant to a non-waiver agreement does not provide the basis for arguing that waiver or estoppel precludes the enforcement of the contractual limitations period in an insurance policy. Blitman Const. Corp. v. Ins. Co. of North America, 66 N.Y.2d 820, 498 N.Y.S.2d 349, 489 N.E.2d 236 (1985). See also Arkin-Medo Corp. v. St. Paul Fire and Marine Ins. Co., 585 F. Supp. 11 (E.D.N.Y. 1982), aff'd, 724 F.2d 1430 (2d Cir, 1983).

Even in the absence of a non-waiver agreement, the New York courts have repeatedly held that an insurer does not waive, and is not estopped from

asserting, the limitations period agreed to in an insurance contract. Gilbert-Frank Corp., 70 N.Y.2d at 968. In Gilbert the Court of Appeals noted that "[e]vidence of communications or settlement negotiations between an insured and its insurer either before or after expiration of a limitations period contained in a policy is not, without more, sufficient to prove waiver or estoppel. . . ." Id.

The Local 38 Funds have not shown that Aetna intended to relinquish the protection of the two-year contractual limitation. On the contrary, through letters and an agreement Aetna has demonstrated its interest in reserving all its rights and defenses under the policy. Furthermore, the facts do not demonstrate that Aetna's conduct lulled plaintiffs into sleeping on their rights.

That Aetna did not contact the Local 38 Funds' counsel until after the expiration of the two-year limitations period does not constitute waiver or estoppel. See Kahn v. Lumbermens Mutual Cas. Co., 293 F. Supp. 985, 989 (E.D.N.Y. 1968) (the insurer's failure to communicate with the insured during the four months between the time that the insured filed proof of loss and the expiration of the contractual limitations period did not give rise to waiver or estoppel); Soltex Thread Co., Inc. v. Rueff Bros., Inc., 111 A.D. 2d 84, 489 N.Y.S.2d 210 (1st Dept. 1985) (the insurer's failure to communicate at all with the insured between the date of the loss and the date that suit was commenced did not constitute the basis for waiver and estoppel).

The fact that Aetna corresponded

with and met with the Local 38 Funds' counsel and reviewed their documents after the expiration of the two-year limitations period also does not constitute waiver or estoppel. See, e.g., Fox-Knapp, Inc., 725 F.Supp at 711; Issa v. Reliance Ins. Co. of New York, 683 F. Supp 82, 83 (S.D.N.Y. 1988) (Mere investigation of a claim pursuant to an insurance contract is a legally insufficient predicate upon which to permit an inference of waiver of a contractual limitations period); Gilbert-Frank Corp., 70 N.Y.2d at 969.

SO ORDERED.

/s/
Vincent L. Broderick, U.S.D.J.

Dated: White Plains, New York
April 8, 1991

APPENDIX C

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
----------X

SHEET METAL WORKERS UNION LOCAL 38 INSURANCE AND WELFARE FUND, SHEET METAL WORKERS UNION LOCAL 38 PENSION FUND, SHEET METAL WORKERS UNION LOCAL 38 VACATION FUND, SHEET METAL WORKERS LOCAL 38 ANNUITY FUND, AND WILLIAM R. PAGANO, as participant, beneficiary and trustee of SHEET METAL WORKERS UNION LOCAL 38 INSURANCE AND WELFARE FUND, SHEET METAL WORKERS UNION LOCAL 38 PENSION FUND, SHEET METAL WORKERS UNION LOCAL 38 VACATION FUND, AND SHEET METAL WORKERS UNION LOCAL 38 ANNUITY FUND,

Plaintiffs,

- against -

THE AETNA CASUALTY AND SURETY COMPANY,

Defendant.

89 Civ. 7903(VLB)

ORDER

----------X

THE AETNA CASUALTY AND SURETY COMPANY,

Third-Party Plaintiff,

- against -

MARTIN J. SCHWIMMER,
MARIO RENDA,
JOSEPH DeCARLO, SR. and
FIRST UNITED FUNDS, LTD.,

Third-Party Defendants.

----------X

VINCENT L. BRODERICK, U.S.D.J.

A final judgment shall be entered pursuant to Rule 54(b), Federal Rules of Civil Procedure, in favor of defendant on the basis of my order dated April 8, 1991 granting defendant's motion for summary judgment and denying plaintiffs' motion for partial summary judgment. There is no just reason for delay.

All proceedings with respect to defendant's third-party complaint shall be stayed pending disposition of the

appeal from the Rule 54(b) judgment. The case is placed on the suspense calendar.

SO ORDERED.

Dated: White Plains, New York
~~July~~ [sic]
August 9, 1991

/s/
Vincent L. Broderick, U.S.D.J.

APPENDIX D

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------X

SHEET METAL WORKERS UNION LOCAL 38 INSURANCE AND WELFARE FUND, SHEET METAL WORKERS UNION LOCAL 38 PENSION FUND, SHEET METAL WORKERS UNION LOCAL 38 VACATION FUND, SHEET METAL WORKERS UNION LOCAL 38 ANNUITY FUND, and WILLIAM R. PAGANO, as participant, beneficiary and trustee of SHEET METAL WORKERS UNION LOCAL 38 INSURANCE AND WELFARE FUND, SHEET METAL WORKERS UNION LOCAL 38 PENSION FUND, SHEET METAL WORKERS UNION LOCAL 38 VACATION FUND, AND SHEET METAL WORKERS UNION LOCAL 38 ANNUITY FUND,

Plaintiffs,

- against -

THE AETNA CASUALTY AND SURETY COMPANY,

Defendant.

89 Civ. 7903 (VLB)

ORDER

----------X

THE AETNA CASUALTY AND SURETY COMPANY,

Third-Party Plaintiff,

- against -

MARTIN J. SCHWIMMER,
MARIO RENDA,
JOSEPH DeCARLO, SR. and
FIRST UNITED FUNDS, LTD.,

Third-Party Defendants.

----------X

VINCENT L. BRODERICK, U.S.D.J.

I vacate my order of July 9, 1991.

I direct that a final judgment be entered in favor of defendant on the basis of my order dated April 8, 1991 that granted defendant's motion for summary judgment and denied plaintiffs' motion for partial summary judgment.

As the defendant's third-party claim is moot, I dismiss the third-party complaint.

SO ORDERED.

/s/
Vincent L. Broderick, U.S.D.J.

Dated: White Plains, New York
October 18, 1991

APPENDIX E

29 U.S.C. provides in relevant part as follows:

29 U.S.C. §1112 Bonding

Every fiduciary of an employee benefit plan and every person who handles funds or other property of such a plan (hereafter in this section referred to as "plan official") shall be bonded as provided in this section;...

.

29 U.S.C. § 1113 Limitations of Actions

No action may be commenced under this subchapter with respect to a fiduciary's breach of any responsibility, duty or obligation under this part, or with respect to a violation of this part, after the earlier of-

1) six years after (A) the date of the last action which constituted a part of the breach or violation, or (B) in the case of an omission, the latest date on which the fiduciary could have cured the breach or violation, or

2) three years after the earliest date on which the plaintiff had actual knowledge of the breach or violation;

except that in the case of fraud or concealment, such action may be commenced

not later than six years after the date of discovery of such breach or violation.

29 U.S.C. §1451 Civil Actions

(a) Persons entitled to maintain actions

(1) A plan fiduciary, employer, plan participant, or beneficiary, who is adversely affected by the act or omission of any party under this subtitle with respect to a multiemployer plan, or an employee organization which represents such a plan participant or beneficiary for purposes of collective bargaining, may bring an action for appropriate legal or equitable relief, or both.

* * *

(f) Time limitations

An action under this section may not be brought after the later of--

(1) 6 years after the date on which the cause of action arose, or

(2) 3 years after the earliest date on which the plaintiff acquired or should have acquired actual knowledge of the existence of such cause of action; except that in the case of fraud or concealment, such action may be brought not later than 6 years after the date of discovery of the existence of such cause of action.

New York Civil Practice Law and Rules

(McKinney's) provides as follows:

§201

An action, including one brought in the name or for the benefit of the state, must be commenced within the time specified in this article unless a different time is prescribed by law or a shorter time is prescribed by written agreement. No court shall extend the time limited by law for the commencement of an action.

§213

The following actions must be commenced within six years:

* * *

2. an action upon a contractual obligation or liability, express or implied, except as provided in section two hundred thirteen-a of this article or article 2 of the uniform commercial code or article 36-B of the general business law;

92-404

No. ~~92-040~~

Supreme Court, U.S.
FILED
SEP 25 1992
THE CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

SHEET METAL WORKERS UNION LOCAL 38 INSURANCE AND WELFARE FUND; SHEET METAL WORKERS UNION LOCAL 38 PENSION FUND; SHEET METAL WORKERS UNION LOCAL 38 VACATION FUND; SHEET METAL WORKERS UNION LOCAL 38 ANNUITY FUND; WILLIAM R. PAGANO, As Participant, Beneficiary and Trustee of Sheet Metal Workers Union Local 38 Insurance and Welfare Fund, Pension Fund, Vacation Fund, and Annuity Fund,

Petitioners,

vs.

AETNA CASUALTY AND SURETY COMPANY,

Respondent.

AETNA CASUALTY AND SURETY COMPANY,

Third-Party Plaintiff,

vs.

MARTIN J. SCHWIMMER, MARIO RENDA, JOSEPH DECARLO, SR. and FIRST UNITED FUNDS, LTD.,

Third-Party Defendants.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

ARTHUR N. LAMBERT
LAMBERT & WEISS
Attorneys for Respondent
61 Broadway, Suite 2020
New York, New York 10006-2701
(212) 344-3100

ARTHUR N. LAMBERT
SUSAN E. JAFFEE
Of Counsel

BEST AVAILABLE COPY

COUNTER-STATEMENT OF QUESTIONS PRESENTED

1. Should a provision in a fidelity policy issued to employee benefit funds, providing that suit under the policy must be commenced within two years from the time that the insured discovers the loss, be upheld and enforced, where neither the Employee Retirement Income Security Act of 1974, as amended, 29 U.S.C. Section 1001, et seq. ("ERISA") and the Bonding Rules promulgated by the United States Department of Labor in 29 C.F.R. subchapter I, Part 2580, contain any limitations period application to an action under a fidelity bond?

2. Should the two-year suit limitation period set forth in a fidelity bond be upheld where Section 2580.412-19(c) of the Bonding Rules

promulgated by the Department of Labor pursuant to Section 412(e) of ERISA, 29 U.S.C. Section 1112(e) authorizes provisions in a fidelity bond consistent with the law of the state in which the bond is executed, and New York law enforces contractual limitations periods in fidelity bonds and other insurance policies?

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In The

SUPREME COURT OF THE UNITED STATES

October Term, 1992

SHEET METAL WORKERS UNION LOCAL 38 INSURANCE AND WELFARE FUND; SHEET METAL WORKERS UNION LOCAL 38 PENSION FUND; SHEET METAL WORKERS UNION LOCAL 38 VACATION FUND; SHEET METAL WORKERS UNION LOCAL 38 ANNUITY FUND; WILLIAM R. PAGANO, As Participant, Beneficiary and Trustee of Sheet Metal Workers Union Local 38 Insurance and Welfare Fund, Pension Fund, Vacation Fund, and Annuity Fund,

Petitioners,

- against -

AETNA CASUALTY AND SURETY COMPANY,

Respondent.

AETNA CASUALTY AND SURETY COMPANY,

Third-Party Plaintiff,

- against -

MARTIN J. SCHWIMMER, MARIO RENDA, JOSEPH DeCARLO, SR. and FIRST UNITED FUNDS, LTD.,

Third-Party Defendants.

BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Respondent, The Aetna Casualty and Surety Company ("Aetna"), respectfully submits this brief in opposition to the petition for a writ of certiorari seeking a review of the order of the United States Court of Appeals for the Second Circuit, entered in this case on May 28, 1992.

STATUTES AND REGULATIONS INVOLVED

Respondent concurs with the statutes reproduced in Appendix E to the Petition. In addition, respondent respectfully refers the Court to the relevant portions of "The Temporary Bonding Rules under the Employee Retirement Income Security Act of

1974" in 29 C.F.R. Subchapter I, Part 2580, which is reproduced in Appendix A to this brief.

COUNTER-STATEMENT OF THE CASE

Introduction

The issues presented for review by petitioners, concerning the enforcement of a two-year limitations period for suits under a fidelity bond issued to employee benefit funds, are neither recurring, controversial matters giving rise to a conflict among the federal circuit courts of appeals, nor are they significant matters in the enforcement of the federal statutory scheme set forth in ERISA. As will be demonstrated in further detail herein, the two-year contractual limitations period, which begins to run when the insured discovers the loss, does not conflict

with any provision of ERISA. That statute does not prescribe a limitations period for suits under a fidelity bond issued to employee benefit plan fiduciaries. Additionally, the two-year limitations period is fully consistent with the Bonding Rules promulgated by the United States Department of Labor, the agency charged with enforcing the ERISA statute. Specifically, Section 2580.412-19(c) of the Bonding Rules authorizes provisions in a fidelity policy consistent with the law of the state in which that policy is executed. As will be further demonstrated herein, the courts of New York, the state in which the fidelity bond at issue was executed, have consistently upheld and enforced contractual limitations periods in

fidelity bonds and other insurance policies. Accordingly, the matter at issue is resolved by well-settled state law. There is, thus, no reason for this Court to exercise its discretion to grant the petition for certiorari.

Background

This section corrects the inaccuracies and omissions in the statement of the case in the petition for certiorari. Respondent respectfully submits that a thorough understanding of the facts, including the relevant provisions of the fidelity bond at issue and the timing of petitioners' claim on the bond and their commencement of the instant action to recover thereunder, is essential to enable this Court to make a reasoned determination whether to

grant the petition.

STATEMENT OF FACTS

Petitioners, the employee benefit funds of Sheet Metal Workers Union Local 38 ("petitioners" or "Sheet Metal Workers Funds"), by their letter dated June 17, 1987, made a claim for the full coverage amount under a Comprehensive Dishonesty, Disappearance and Destruction Policy ("Aetna's policy" or the "fidelity bond") written by respondent, Aetna Casualty & Surety Company ("Aetna"), as insurer.

The basis of petitioners' claim, as set forth in their letter of June 17, 1987, was "for losses resulting from alleged dishonesty on the part of Martin J. Schwimmer, our former investment adviser, in connection with

his handling and investment of our funds."

Section 8 of Aetna's policy requires that any suit brought under the policy must be commenced within two years from the date that the insured discovers its loss. Petitioners' suit, however, was not commenced until November 29, 1989, more than two years after their letter of June 17, 1987, acknowledging the discovery of losses due to the alleged dishonesty of Martin J. Schwimmer ("Schwimmer").

Aetna's Policy

Aetna's policy insured petitioners, against, inter alia, "Loss of Money, Securities and other property which the Insured shall sustain ... resulting directly from

one or more fraudulent or dishonest acts committed by an Employee, acting alone or in collusion with others."

In enlarged print, the policy provided that the insuring agreement and general agreements:

> "...ARE SUBJECT TO THE FOLLOWING CONDITIONS AND LIMITATIONS."

Section 8 of the policy is encaptioned in large print as follows:

> "LOSS-NOTICE-PROOF
>
> ACTION AGAINST COMPANY"

Section 8 provides, in pertinent part, as follows:

> No action shall lie against the Company ...at all unless commenced within two years from the date when the insured discovers the loss. If any limitation of time for notice of loss or any legal proceeding herein contained is shorter than that permitted to be fixed by agreement under any statute

> controlling the construction of this Policy, the shortest permissible statutory limitation shall govern and shall supersede the time limitation herein stated.

(emphasis added)

Events Leading To Petitioners' First Notice To Aetna Of Their Claim

By letter of June 17, 1987, Robert Carleton, the Manager of the Sheet Metal Workers Funds, advised Aetna "... of our claim for $1,000,000.00, the full coverage under the above policy...for the losses resulting from the alleged dishonesty on the part of Martin J. Schwimmer, our former investment advisor, in connection with his handlings and investment of our funds." This letter coincided with the indictment of Schwimmer and a co-conspirator, Mario Renda. That indictment and petitioners' letter making claim against Aetna followed an

uncontroverted series of events going back to 1985, pertaining to Schwimmer and Renda and their dealings with the Sheet Metal Workers Funds.

In August 1985, the Sheet Metal Workers Local Union 38 Insurance and Welfare Fund was subpoenaed by the Special Assistant United States Attorney, Bruce Maffeo, the attorney responsible for the criminal prosecution of Schwimmer, to testify before a Grand Jury. The Insurance and Welfare Fund was required to produce, pursuant to that subpoena, inter alia, "Bank Statements... for all operating accounts," a "Descriptive List of all investments made...", "Names and last known addresses of all investment counselors", and correspondence and other documents pertaining to

investment counselors. Robert Carleton, himself, was subpoenaed to testify before the Grand Jury in connection with a RICO investigation of Schwimmer.

At the July 21, 1986 meeting of the Board of Trustees of the Local 38 Pension and Annuity Funds, Dr. Schwimmer was asked by the Trustees' counsel to provide a letter "setting forth in detail his arrangement with all brokers and other intermediaries... through which investments are made for the Funds". Dr. Schwimmer agreed to provide such a letter, in compliance with a Department of Labor technical release, "after consultation with his attorney".

At a meeting held on July 29, 1986, Dr. Schwimmer, again, assured

the Trustees that he would provide a letter describing how he invested the Fund monies. Discussions concerning Schwimmer's relationship with intermediaries through which monies were invested continued at the meeting of the Trustees held on September 16, 1986.

By a letter dated September 16, 1986, Schwimmer advised the Trustees of his relationship with First United Fund. Renda was president and owner of First United Fund and its parent corporation, First United Financial Corp. ("First United").

At the Trustees' meeting of October 6, 1986, there were extensive discussions of the Federal government's investigation of "brokered deposits" and of "charges pending against Dr. Schwimmer." The

Funds' attorney "asked for details of the work Dr. Schwimmer does for First United". Dr. Schwimmer revealed that he provided services to First United and that First United had been sued by the FDIC for RICO violations.

Discussions with Dr. Schwimmer concerning his relationship with First United Fund continued at the Trustees' meeting of December 18, 1986.

A Grand Jury indictment of Schwimmer and Renda was ordered unsealed on June 16, 1987. That 45-page indictment described, in detail, the involvement of Schwimmer and Renda in a scheme to obtain excessive commissions from banks and savings and loan associations in which they invested money from the Sheet Metal Workers Funds.

On June 17, 1987, the day after

the detailed Grand Jury indictment of Schwimmer and Renda was ordered unsealed, Fund manager Carleton wrote to Aetna making claim for the full policy amount for Schwimmer's alleged defalcations.

Events Following Petitioners' Claim Letter To Aetna

Renda entered into a plea agreement with the government with respect to certain charges in the indictment in May, 1988. Schwimmer was convicted of a majority of the counts of the indictment on October 28, 1988, after trial.

On October 27, 1988, the Sheet Metal Workers Funds commenced an action against Schwimmer and Renda alleging RICO violations. The complaint against Schwimmer and Renda was basically a reiteration of the

June, 1987 criminal indictment against them.

The Sheet Metal Workers Funds provided Aetna with a "proof of loss", dated February 8, 1989. Significantly, petitioners' proof of loss designated June 8, 1977 (sic) as the date the insured "learned of Loss" and June 17, 1977 (sic)[1] as the date that the loss was reported to the insurance company.

On June 19, 1989, Aetna's counsel wrote a letter to Fund manager Carleton requesting certain documents needed to evaluate the claim made under the Aetna policy. Said letter contained the following concluding

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1. This appears to be an error. It is likely that petitioners meant that they discovered the loss on June 8, 1987 and reported it to Aetna on June 17, 1987, the date of Mr. Carleton's letter making claim on the policy.

paragraph:

> Please be advised that nothing heretofore, nor contained herein, is intended as a waiver, estoppel or modification of the terms, provisions, conditions, limitations or exclusions of Aetna's policy of insurance, all of which are expressly reserved, together with such rights and defenses as are available pursuant to the policy or by law.

On September 15, 1989, Aetna's counsel wrote a further letter to petitioners' counsel reiterating the request for certain documents to evaluate the claim. Said letter concluded with a paragraph reserving Aetna's rights and defenses under the policy.

On October 23, 1989, Aetna's counsel met with the attorneys for the Sheet Metal Workers Funds and Fund Manager Robert Carleton to discuss the claim made by the Funds.

At the October 23, 1989 meeting, petitioners' counsel executed, on behalf of the Sheet Metal Workers Funds, a letter containing the following provisions, known as a "non-waiver agreement".

> It is agreed and understood that any action done to date or to be done subsequently by or on behalf of either the Aetna Casualty and Surety Company or the Employee of Benefit Funds of Sheet Metal Workers Local 38 ("Local 38 Funds") in connection with the claim by the Local 38 Funds under Comprehensive Dishonesty, Disappearance and Destruction Policy No. 74 BY 3109 BCA for an alleged loss sustained as the result of the acts of Martin J. Schwimmer, ...shall not be construed to be an admission of liability on the claim, nor shall it be construed to waive or modify any of the terms, conditions and provisions of the policy. It is further understood that any action taken relative to the claim shall not constitute an estoppel or waiver of any kind, nor waive, invalidate, forfeit or modify any of the rights, remedies, liabilities or defenses which either the

> Aetna Casualty and Surety Company or the Local 38 Funds may have with respect to the aforesaid insurance policy or claim.

(emphasis added)

The Instant Action And The Proceedings Below

On or about November 29, 1989, over five months after the expiration of the two-year limitations period contained in Aetna's policy, petitioners commenced the instant action recover under the policy.

After service of an answer and an amended answer, as well as a set of interrogatories, Aetna was granted leave by the District Court to move for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure. Petitioners cross-moved for partial summary judgment.

In a well-reasoned opinion, Hon.

Vincent L. Broderick of the United States District Court for the Southern District of New York granted Aetna's motion for summary judgment and denied petitioners' cross-motion.

The District Judge's opinion concluded that petitioners' action was time-barred due to their failure to commence the action within the two-year limitations period prescribed by Aetna's policy. After reviewing the extensive history of petitioners' knowledge of the loss caused by the dishonesty of Schwimmer, beginning in the summer of 1985, the District Court concluded, "under the objective standard enunciated by the Second Circuit, the latest possible date upon which plaintiffs may be deemed to have discovered that alleged loss was June 17, 1987, the day the Local 38 Funds

administrator notified Aetna of the alleged loss" (P. 19a[2]).

In his opinion, Judge Broderick correctly rejected the argument which is the basis for the instant petition, namely, that the contractual limitations period for actions brought under Aetna's policy is superseded by Section 413 of ERISA, 29 U.S.C. Section 1113. The opinion of the District Court correctly reasoned, as follows:

> Plaintiff incorrectly attempts to apply the limitations period set forth in section 413. The limitations periods prescribed in this section relate only to actions alleging"... a fiduciary's breach of any responsibility, duty or obligation under this part, or with respect to a violation of

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2. Page references preceded by "P" refer to the Petition for Certiorari. The designation "a" refers to the appendix to the petition in which the opinion of Hon. Vincent L. Broderick is printed.

> this part...". In the instant case, the Local 38 Funds seek to enforce Aetna's alleged contractual obligation to indemnify the Sheet Metal Workers Funds pursuant to an insurance policy. For ERISA section 413 to be applicable, the Local 38 Funds would have to allege a breach of duty by a fiduciary or a violation of Part 4 of ERISA, 28 U.S.C. Section 1101, et seq.
>
> Section 412 of ERISA, 29 U.S.C. Section 1112, requires bonding of every fiduciary and of every person who handles the funds or other property of an employee benefit plan. This statute does not prescribe a limitations period for suits to enforce provisions of fidelity bonds issued to ERISA benefit plans. The fact that Aetna's policy was issued to satisfy certain statutory requirements of ERISA does not preclude the enforcement of Aetna's two-year contractual limitations period.

(P. 22a-23a)

Petitioners appealed to the United States Court of Appeals for the Second Circuit. In a unanimous decision, the Court of Appeals affirmed the judgment of the District Court "substantially

for the reasons set forth in Judge Broderick's order of October 18, 1991" (P. 2a-3a). Petitioners are seeking the review of this order of the Second Circuit.

ARGUMENT

POINT I

THIS CASE IS INAPPROPRIATE FOR REVIEW, AS THE SOLE ISSUE RAISED BY PETITIONERS IS NOT AN IMPORTANT, RECURRING, CONTROVERSIAL QUESTION WARRANTING RESOLUTION BY THIS COURT

The review by this Court "on writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only when there are special and important reasons therefor." Rule 10 of the Rules of the United States Supreme Court. This is not a case involving issues sufficiently important or controversial to warrant review by this Court.

The Rules of this Court further provide that two major criteria for determining whether to grant a petition for a writ of certiorari are:

(1) whether "a United States Court of Appeals has rendered a decision in conflict with the decision of another United States court of appeals on the same matter" (Rule 10(a) of the Rules of the United States Supreme Court. See Northeastern Pennsylvania National Bank and Trust Co. v. United States, 387 U.S. 213, 87 S.Ct. 1573, 18 L.Ed. 2d 726 (1967); Pearlman v. Reliance Insurance Co., 371 U.S. 132, 83 S.Ct. 232, 9 L.Ed.2d 190 (1962)); and (2) "(w)hen a state court or a United States court of appeals has decided an important question of federal law which has not been, but should be, settled by this Court ...". Rule 10(c) of the Rules of the United States Supreme Court. See also I.C.C. v. Atlantic Coast Line Railroad Co., 383 U.S. 576, 86 S.Ct. 1000, 16

L.Ed.2d 109 (1966); Securities and Exchange Commission v. Capital Gains Research Bureau, Inc., 375 U.S. 180, 84 S.Ct. 275, 11 L.Ed.2d 237 (1963); Pearlman v. Reliance Insurance Co., 371 U.S. 132, 83 S.Ct. 232, 9 L.Ed.2d 190. The instant case meets neither of the above criteria.

First, there is no conflict among the United States courts of appeals regarding the issue raised by petitioners, namely, whether the provisions of the Employee Retirement Income Security Act of 1974, as amended, 29 U.S.C. Section 1001, et seq. ("ERISA") preclude the enforcement of a contractual limitations period for the commencement of actions to recover under a fidelity bond issued to fiduciaries of an employee benefit

fund. Petitioners have failed to cite a single decision from a federal court of appeals, or any other federal court, adhering to their position that the time to bring an action to recover under a fidelity bond issued pursuant to Section 412(a) of ERISA, 29 U.S.C. Section 1112(a) is governed by the limitations period for actions "with respect to a fiduciary's breach of any responsibility, duty or obligation under this part, or with respect to a violation of this part ..." set forth in Section 413 of ERISA, 29 U.S.C. Section 1113. Nor is there any support for petitioners' alternative contention that the time to bring an action to recover under a fidelity bond is governed by the state limitations period for actions to recover for breach of contract.

Indeed, petitioners actually concede, "The present action is apparently the first instance wherein the issue (referring to the enforceability of the contractual limitations period in a fidelity bond or other insurance policy) has arisen in the context of ERISA" (P. 20) (parenthetical supplied).

The cases cited by petitioners regarding the provisions of fidelity bonds and other insurance policies issued in accordance with federal statutes are irrelevant. Many of petitioners' authorities do not even deal with insurance policies issued pursuant to ERISA. For example, Hack v. American Surety Co. of New York, 96 F.2d 939 (7th Cir. 1938), cert. denied, 305 U.S. 631, 59 S.Ct. 95, 83 L.Ed.2d 405 (1938), reh'g denied, 305

U.S. 671, 59 S.Ct. 145, 83 L.Ed.2d 435 (1938), a decision upon which petitioners rely heavily, concludes, based upon the law of the State of Indiana, not federal law, that the limitations period in a state statute controls over the one-year contractual limitations in a fidelity bond insuring against loss due to the dishonesty of bank officers. The fidelity bond at issue in Hack was required by a state, not a federal, statute and contained explicit language providing that if the twelve-month contractual limitations period shall "'be void under the law of the place governing the construction hereof'", then actions to recover under the bond must be commenced "'within the shortest period of limitation permitted by such law'."

Hack v. American Surety Co. of New York, 96 F.2d at 941. The Court of Appeals held that an action to recover under the fidelity bond had to be brought within the three-year limitations period, provided by Indiana law, applicable to foreign corporations. Hack v. American Surety Co. of New York, 96 F.2d at 942, 944.

In the instant case, by contrast, neither Section 412 of ERISA, 29 U.S.C. Section 1112, nor the Bonding Regulations promulgated by the Secretary of Labor pursuant to Section 412(e) of ERISA, 29 U.S.C. Section 1112(e), prescribe a limitations period for actions to recover under a fidelity bond. Indeed, as will be discussed in further detail in Point II, infra, the applicable Department of Labor regulations explicitly permit

a fidelity bond issued pursuant to Section 412(a) of ERISA to contain a limitations period which is not "in contravention of the law of the State in which it is executed". 29 C.F.R. Section 2580.412-19(c).

Federal and state cases from New York cited by petitioners unanimously uphold contractual limitations periods in insurance policies, analogous to the two-year limitations period in Aetna's policy at bar. See Fox-Knapp, Inc. v. Employers Mutual Casualty Co., 725 F.Supp. 706 (S.D.N.Y. 1989), aff'd, 893 F.2d 14 (2nd Cir. 1989); Kahn v. Lumbermens Mutual Casualty Co., 293 F.Supp. 985 (E.D.N.Y. 1968); Proc v. Home Insurance Company, 17 N.Y.2d 239, 270 N.Y.S.2d 412, 217 N.E.2d 136 (1966), rearg. denied, 18 N.Y.2d 751, 274 N.Y.S.2d 1031, 221

N.E.2d 183 (1983). The above cases concern fire insurance policies, where there are stronger reasons for invalidating contractual limitations periods than petitioners assert in relation to the fidelity bond at bar. Fire insurance policies are often issued to individuals, who may not be represented by counsel, as were the Sheet Metal Workers Funds in the instant case. Nevertheless, the Standard Fire Insurance Policy prescribed by Section 3404(e) of the New York Insurance Law specifically authorizes a two-year limitations period for actions to recover under the policy[3].

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3. The cases cited by petitioners have enforced even shorter contractual limitations periods. For example, Kahn v. Lumbermens Mutual Casualty Co., 293 F.Supp. 985 and Proc v. Home Insurance Co., 17 N.Y.2d 239, 270 N.Y.S.2d 412, 217 N.E.2d 136, applied

Other authorities relied upon by petitioners, likewise, do not deal with the validity of the contractual limitations period in fidelity bonds issued pursuant to Section 412(a) of ERISA. In Dixey v. Federal Compress and Warehouse Co., 132 F.2d 275 (8th Cir. 1942), the Court of Appeals concluded that regulations promulgated by the Secretary of Agriculture, requiring warehousemen to procure insurance for cotton stored in their facilities, must be read into and

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a 12 month limitations period for fire insurance policies. The New York Insurance Law, Section 3404(e), subsequently adopted a two-year limitations period for the Standard Fire Insurance Policy. In Fox-Knapp, Inc. v. Employers Mutual Casualty Co., 725 F.Supp 706, the District Court enforced a one-year contractual limitations period in a multi-peril policy for a business interruption loss, as opposed to the two-year limitations period in the New York Standard Fire Policy.

deemed a part of every warehouse receipt. In the instant case, by contrast, the applicable regulations by the Secretary of Labor do not prescribe a specific limitations period for fidelity bonds issued pursuant to Section 412 of ERISA but, rather, specifically authorize such policies to incorporate limitations periods consistent with the applicable state law. See 29 C.F.R. Section 2580.412-19(c).

In American Casualty Co. of Reading, Pa. v. Irvin, 426 F.2d 647 (5th Cir. 1970), the Court of Appeals concluded that statutory and regulatory provisions relating to bonds issued pursuant to the Packers and Stockyards Act, requiring thirty days' notice prior to termination, must be read into bonds procured by

livestock dealers. Lastly, Lampf, Pleva, Lipkind, Prupis and Petigrow v. Gilbertson, ___ U.S. ___, 111 S.Ct. 2773, 115 L.Ed.2d 321 (1991), reh'g denied, __ U.S. __, 112 S.Ct. 27, 115 L.Ed.2d 1109 (1991), dealt with the limitations period applicable to actions brought pursuant to Section 10(b) of the Securities Exchange Act of 1934 and did not deal at all with the contractual limitations periods in insurance policies.

Several decisions cited by petitioners even support the enforcement of the contractual limitations period in Aetna's policy. For example, in Johnson v. Railway Express Agency, Inc., 421 U.S. 454, 95 S.Ct. 1716, 44 L.Ed.2d 295 (1975), this Court applied state tolling provisions to a civil rights suit

brought pursuant to 42 U.S.C. Section 1981, where the state statute of limitations was applied. As will be discussed in further detail in Point II, infra, it is perfectly permissible to apply the provisions of Section 201 of New York's Civil Practice Laws and Rules, authorizing parties to prescribe shorter limitations periods by written agreement, to fidelity bonds issued to employee benefit plans, for which ERISA does not provide a federal limitations period.

In Del Costello v. International Brotherhood of Teamsters, 462 U.S. 151, 103 S.Ct. 2281, 76 L.Ed.2d 476 (1983), this Court applied a 6-month limitations period to an action brought by an employee against a union alleging breach of the duty of fair representation. See also Degan v.

Ford Motor Co., 869 F.2d 889 (5th Cir. 1989); United Independent Flight Officers, Inc. v. United Airlines, Inc., 756 F.2d 1262 (7th Cir. 1985) (following Del Costello). The 6-month limitations period endorsed by this Court for actions against a labor organization alleging breach of the duty of fair representation is far shorter than the two-year limitations period in Aetna's policy. Moreover, actions for breach of the duty of fair representation are generally brought by individual employees, who may not be represented by counsel. By contrast, the Sheet Metal Workers Funds at bar are relatively sophisticated organizations which were represented by counsel during the course of their claim on Aetna's policy.

Several cases cited by petitioners even conclude that ERISA does not prohibit contractual provisions which modify the procedures for enforcing certain statutory remedies. For example, in Bird v. Shearson Lehman/American Express, Inc., 926 F.2d 116 (2nd Cir. 1991), cert. denied, ___ U.S. ___, 111 S.Ct. 2891, 115 L.Ed.2d 1056 (1991), the Court of Appeals held that ERISA does not prohibit parties from agreeing to submit statutory claims for breach of fiduciary duty to arbitration. The Court of Appeals reached the above conclusion, based upon the prior decisions of this Court in Rodriguez de Quijas v. Shearson/American Express, Inc., 490 U.S. 477, 109 S.Ct. 1917, 104 L.Ed.2d 526 (1989), and Shearson Lehman/American Express, Inc.

v. Bird, 493 U.S. 884, 110 S.Ct. 225, 107 L.Ed.2d 177 (1989), despite the fact that Section 502(e)(1) of ERISA, 29 U.S.C. Section 1132(e)(1), explicitly provides that the federal courts shall have exclusive jurisdiction over all civil actions to enforce ERISA, except actions to recover benefits brought pursuant to section 502(a)(1)(B) of ERISA, 29 U.S.C. Section 1132(a)(1)(B).

The above result strikes a mortal blow at petitioners' assertion that the federal policies behind ERISA preclude parties from contractually agreeing to a limitations period for actions to recover under a fidelity bond issued pursuant to 29 U.S.C. Section 1112(a), particularly in view of the fact that both the statute and the Department of Labor regulations

are silent on this issue. See also Scheirer v. NMU Pension and Welfare Plan, 585 F.Supp. 76 (S.D.N.Y. 1984) (upholding limitations period of two years and 90 days to recover death benefit, established by rules of union pension and welfare plan).

In sum, the absence of caselaw supporting petitioners' assertions that ERISA precludes the enforcement of the two-year contractual limitations period in Aetna's policy reveals the lack of importance of this issue. Accordingly, there is no basis for this Court to exercise its discretion to grant the petition for a writ of certiorari in this matter.

POINT II

THE RESULT REACHED BY THE COURT BELOW, CONCLUDING THAT PETITIONERS' ACTION IS BARRED BY THE TWO-YEAR CONTRACTUAL LIMITATIONS PERIOD IN AETNA'S POLICY, IS FULLY CONSISTENT WITH ERISA, THE APPLICABLE DEPARTMENT OF LABOR REGULATIONS AND THE STATE LAW GOVERNING THIS MATTER

There is no necessity for this Court to take the extraordinary action of granting the petition for a writ of certiorari, as the result reached by the Court below[4] accords fully with the applicable provisions of ERISA, the Department of Labor regulations, and the state law governing the enforcement of contractual limitations periods in insurance policies. As was

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4. The well-reasoned opinion of Hon. Vincent L. Broderick of the United States District Court for the Southern District of New York, which was affirmed by the United States Court of Appeals for the Second Circuit, is reprinted in the appendix to the petition at P. 4a-28a.

emphasized in Point I, supra, petitioners have not cited a single authority which adopts their position that the limitations period set forth in Section 413 of ERISA, 29 U.S.C. Section 1113 or, alternatively, the state limitations period for actions to recover for breach of contract, should supersede the contractual limitations period in a fidelity bond issued to an employee benefit plan.

The language of the statutory provisions cited by petitioners does not support their position. Section 412 of ERISA, 29 U.S.C. Section 1112, does not prescribe a limitations period for actions to recover under a fidelity bond issued to an employee benefit plan. Section 413 of ERISA, 29 U.S.C. Section 1113, deals with limitations of actions "with respect

to a fiduciary's breach of any responsibility, duty, or obligation under this part, or with respect to a violation of this part ...", not with actions to recover under a fidelity bond. See Wright v. Southwestern Bell Telephone Co., 925 F.2d 1288, 1290 (10th Cir. 1991) (Section 413 of ERISA is "only applicable to actions arising out of violations of the portion of the Act addressing fiduciary responsibilities", not to an action brought by a former employee to recover disability benefits); Trustees of Wyoming Laborers Health and Welfare Plan v. Morgen & Oswood Construction Co., Inc., 850 F.2d 613, 618 n.8 (10th Cir. 1988) ("The statute of limitations contained in 29 U.S.C. Section 1113 applies only to actions brought to redress a fiduciary's

breach of its obligations to enforce the provisions of ERISA"); Scheirer v. NMU Pension and Welfare Plan, 585 F.Supp at 79 (limitations period in Section 413 of ERISA does not apply to a father's suit to recover death benefits owed for his son, where no breach of fiduciary duty was alleged.

An insurance company, like Aetna, which issues a fidelity bond to an employee benefit fund, is not even a fiduciary, pursuant to the provisions of ERISA. See Rochester Radiology Associates, P.C. v. Aetna Life Insurance Co., 616 F.Supp. 985 (W.D.N.Y. 1985) (insurance company which issued group annuity contract to a retirement fund is not a fiduciary, within the meaning of ERISA). Accordingly, there is no legal support for petitioners' assertion that the

instant action to recover under Aetna's policy is governed by the limitations period in Section 413 of ERISA.

Petitioners neglect to mention the significant fact that the applicable regulations promulgated by the Secretary of Labor do not prescribe a limitations period for actions to recover under a fidelity bond issued to an employee benefit fund. Indeed, the regulations specifically provide that a fidelity bond issued pursuant to Section 412(a) of ERISA will not fulfill the statutory requirements if "it contains a clause, or is otherwise, in contravention of the law of the State in which it is executed." 29 C.F.R. Section 2580.412-19(c)[5].

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5. The above provision is contained in the "Temporary Bonding Rules under the Employee Retirement Income Security

The Department of Labor regulations contain requirements regarding other aspects of fidelity

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Act of 1974". These regulations define the requirements under ERISA, as well as under Section 13(a) of the Welfare and Pension Plans Disclosure Act of 1958, as amended, the predecessor statute to ERISA. Another provision of the Department of Labor regulations explains, as follows:

> Section 2550.412-1 Temporary bonding requirements
>
> (a) Pending the issuance of permanent regulations with respect to the bonding provisions under section 412 of the Employee Retirement Income Security Act of 1974 (the Act), any plan official, as defined in section 412(a) of the Act, shall be deemed to be in compliance with the bonding requirements of the Act if he or she is bonded under a bond which would have been in compliance with section 13 of the Welfare and Pension Plans Disclosure Act, as amended (the WPPDA), and with the basic bonding requirements of subparts A through E of part 2580, title 29 CFR.

To date, the Secretary of Labor has not promulgated permanent regulations

bonds issued to plan fiduciaries, including, for example: (1) the definition of "fraud and dishonesty" (29 C.F.R. Section 2580.412-9); (2) the amount of the bond (29 C.F.R. Section 2580.412-11); (3) the term of the bond (29 C.F.R. Section 2580.412-19(a)); and (4) a provision for mandating a one-year discovery period after the termination or cancellation of the bond (29 C.F.R. Section 2580.412-19(b)). The omission from the regulations of a provision establishing a limitations period for actions to recover under the bond is further evidence that Congress and the Secretary of Labor intended to leave this matter to the States. It is well-settled that the regulations

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concerning fidelity bonds issued pursuant to Section 412(a) of ERISA.

promulgated by an agency, like the Department of Labor, entrusted with enforcing a statute, are entitled to great deference. See, e.g. Dixey v. Federal Compress and Warehouse Co., 132 F.2d 275, supra.

The clear import of both the relevant provisions of ERISA and the Department of Labor regulations is that state law governs the applicable limitations period for suits to recover under a fidelity bond.

As was emphasized in Point I, supra, the law of New York has consistently enforced contractual limitations periods set forth in insurance policies. See, e.g. Fox-Knapp, Inc. v. Employers Mutual Casualty Co., 725 F.Supp. 706 (S.D.N.Y. 1989), aff'd, 893 F.2d 14 (2nd Cir. 1989); Kahn v. Lumbermens

Mutual Casualty Co., 293 F.Supp. 985 (E.D.N.Y. 1968); Proc v. Home Insurance Co., 17 N.Y.2d 239, 270 N.Y.S.2d 412, 217 N.E.2d 136 (1966), rearg. denied, 18 N.Y.2d 751, 274 N.Y.S.2d 1031, 221 N.E.2d 183 (1983); Culinary Institute of America v. Aetna Casualty and Surety Co., 151 A.D.2d 638, 542 N.Y.S.2d 705 (2nd Dept. 1989) (upholding two-year limitations period in fidelity bond issued by Aetna); Alray International Equipment, Inc. v. Aetna Casualty and Surety Co., 65 A.D.2d 651, 409 N.Y.S.2d 664 (3rd Dept. 1978), aff'd, 48 N.Y.2d 750, 422 N.Y.S.2d 666, 397 N.E.2d 1333 (1979) (upholding two-year limitations period in blanket crime protection policy issued by Aetna); Section 201 of the New York Civil Practice Laws and Rules. New York law upholds the

contractual limitations periods in insurance policies, even if they were issued to federally regulated businesses, as was the stockholders' blanket bond at issue in Redington v. Hartford Accident and Indemnity Co., 463 F.Supp. 83 (S.D.N.Y. 1978).

Courts from other jurisdictions have, likewise, consistently enforced contractual limitations periods in insurance policies, irrespective of whether the policies were issued to federally regulated businesses or organizations. In the case of Riddlesparger v. Hartford Insurance Co., 74 U.S. (7 Wall.) 386, 19 L.Ed. 257 (1868), this Court enforced a one-year limitations period in a fire insurance policy. This Court made the following observations, which are equally applicable to the limitations

period in Aetna's policy at bar. "The condition (limitations period) in the policy in this case does not interfere with the authority of the courts; it simply exacts promptitude on the part of the assured in the prosecution of his legal remedies, in case a loss is sustained, respecting which a controversy arises between the parties." Riddlesparger v. Hartford Insurance Co., 74 U.S. at 391 (parenthetical added).

In the instant case, as well, no federal policy is offended by the two-year limitations period in Aetna's policy. The Sheet Metal Workers Funds were represented by counsel throughout the period when the claim on Aetna's policy was made. Indeed, the Sheet Metal Workers funds brought an action against Schwimmer and Renda, the

alleged wrongdoers, well within the limitations period for an action to recover under Aetna's policy. The untimeliness of the instant action results entirely from lack of diligence on the part of the Sheet Metal Workers Funds, rather than any inherent flaw with the contractual limitations period. See Vernau v. Vic's Market, Inc., 896 F.2d 43, 46 (3rd Cir. 1990) (Suit by benefit plan trustees against employer to recover contributions barred by applicable state statute of limitations, as trustees did not exercise reasonable diligence in investigating and discovering employer's breach of collective bargaining agreement); Rochester Radiology Associates v. Aetna Life Insurance Co., 616 F.Supp. 985, 989 (W.D.N.Y. 1985)

(beneficiaries of group annuity contract time-barred from suing Aetna pursuant to Section 413 of ERISA, 29 U.S.C. Section 1113, as the plaintiffs clearly had knowledge of the change in the formula for valuation of the plan assets, yet failed to act diligently in assessing the impact of the change).

The federal courts have upheld contractual limitations periods in insurance policies under a variety of circumstances, including policies required by federal statutes or policies issued to federally regulated entities. In Skirlick v. PATCO, 659 F.Supp. 104 (D.D.C. 1987), aff'd on other grounds sub nom. Skirlick v. Fidelity & Deposit Co. of Maryland, 852 F.2d 1376 (D.C. Cir. 1988), cert. denied, 488 U.S. 1007, 109 S.Ct. 790,

102 L.Ed.2d 781 (1989), the District Court granted summary judgment to an insurer in an action by employees to recover under a fidelity bond issued pursuant to Section 502(a) of the Labor-Management Reporting and Disclosure Act of 1959, as the plaintiffs failed to bring the action within the contractual limitations period, in that case one year after the discovery of the loss. The Court concluded that enforcing the contractual limitations period would not offend any federal policy advanced by the statute. The District Court observed, "I fail to see any significant relationship between the bonding requirements of Section 502 and the Bill of Rights guarantees of Section 101(a)(4) and thus cannot see how enforcing the notice provisions of

this union contract (referring to the fidelity bond) will undercut the union members statutorily guaranteed rights." Skirlick v. PATCO, 659 F.Supp at 107[6] (parenthetical added). Similarly in the instant case, petitioners' assertion that the limitations period in Aetna's policy conflicts with the federal policies underlying ERISA is devoid of merit and support.

In Farley v. Northwest Marine Iron Works, 724 F.Supp. 1274 (D. Ore. 1989), the District Court held that a widow's action to recover life

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6. The District Court also concluded in Skirlick v. PATCO, 659 F.Supp. at 107-108, that the action to recover on the fidelity bond should be dismissed for another reason, namely, that the alleged illegal strike lead by the union leaders did not constitute "fraud or dishonesty", within the meaning of the bond, the statute, or the applicable regulations.

insurance benefits pursuant to an ERISA-regulated plan was barred by the three-year contractual limitations period authorized by the applicable state law. In Fuller v. Blue Cross and Blue Shield of Florida, 677 F.Supp. 1131 (N.D. Fla. 1987), the District Court enforced a two-year limitations period contained in a health insurance plan pursuant to the Federal Employees Health Benefit Act. See also Scarborough v. Travelers Insurance Co., 718 F.2d 702 (5th Cir. 1983) (enforcing contractual limitations period in workers' compensation policy, where injured party brought an action pursuant to the Jones Act, 46 U.S.C. Section 688, following McMillian v. Coating Specialist, Inc., 427 F.Supp. 54 (E.D. La. 1976)); Goosen v. Indemnity

Insurance Co. of North America, 234 F.2d 463 (6th Cir. 1956) (Court enforces contractual limitations period in suit brought by trustee in bankruptcy to recover under a fidelity bond); Chandler Trailer Co. v. Lawyer's Surety Corp., 535 F.Supp. 204 (E.D. Ark. 1982) (Court enforces two-year contractual limitations period for suit to recover under a fidelity bond as fully consistent with the applicable state law). As the cases cited above demonstrate, there is no support for petitioners' argument that the contractual limitations period for actions to recover under Aetna's policy conflicts with ERISA and the federal policies underlying the statute.

The cases cited by petitioners are irrelevant to the issue in this

matter. Kennedy v. Allied Mutual Insurance Co., 952 F.2d 262 (9th Cir. 1991) did not deal with the issue of the contractual limitations period in a fidelity bond but, rather, whether the plan at issue is governed by ERISA or is exempt from that statute. Similarly, Isola v. Hutchinson, 780 F.Supp. 1299 (N.D. Cal. 1991), did not deal with an insurer's contractual limitations period, but rather, held that a plan participant whose benefits were not paid has standing to sue the insurers who issued fidelity bonds to the plan fiduciaries. See also Alleyne v. McCusker, 5 E.B.C. 1650 (C.D. Cal. 1983) (although Department of Labor regulations regulating fidelity bonds issued pursuant to Section 412(e) of ERISA authorize a one-year discovery period to cover

claims after the termination of the bond, this provision is not enforced where a party can prove that the wrongdoer so dominated the employee benefit trust, that the trustees were prevented from timely discovering the loss).

A group of cases cited by petitioners involve suits by plan participants or beneficiaries to recover benefits. The majority of these cases hold that such actions are governed by the applicable state limitations period for breach of contract claims. See, e.g., Held v. Manufacturers Hanover Leasing Corp., 912 F.2d 1197 (10th Cir. 1990); Miles v. New York State Teamsters Conference Pension and Retirement Fund Employee Pension Benefit Plan, 698 F.2d 593 (2nd Cir. 1983), cert. denied, 464

U.S. 829, 104 S.Ct. 105, 78 L.Ed.2d 108 (1983); Plazzo v. Nationwide Mutual Insurance Co., 697 F.Supp. 1437 (N.D. Ohio 1988), rev'd, 892 F.2d 79 (6th Cir. 1989), cert. denied, __ U.S. __, 111 S.Ct. 370, 112 L.Ed.2d 332 (1990).

Another group of cases cited in the petition deal with suits by employee benefit funds and their trustees to recover unpaid contributions. The majority of these decisions apply the applicable state limitations period for breach of contract actions. See, e.g., Trustees of Wyoming Laborers Health and Welfare Plan v. Morgen & Oswood Construction Co., 850 F.2d 613 (10th Cir. 1988); Hawaii Carpenters Trust Funds v. Waiola Carpenter Shop, Inc., 823 F.2d 289 (9th Cir. 1987); Trustees for

Alaska Laborers-Construction Industry Health and Security Fund v. Ferrell, 812 F.2d 512 (9th Cir. 1987); Central States Southeast and Southwest Areas Pension Fund v. Kraftco, Inc., 799 F.2d 1098 (6th Cir. 1986), cert. denied, 479 U.S. 1086, 107 S.Ct. 1291, 94 L.Ed.2d 147 (1987).

Other decisions, however, follow the ruling of the United States Court of Appeals for the Third Circuit in Adams v. Gould, Inc., 739 F.2d 858 (3rd Cir. 1984), cert. denied sub. nom. Gould, Inc. v. Adams 469 U.S. 1122, 105 S.Ct. 806, 83 L.Ed.2d 799 (1985), that the limitations period in Section 413 of ERISA, 29 U.S.C. Section 1113 applies to actions by employees and benefit fund trustees to compel employers to contribute to the funds. See also Edwards v.

Wilkes-Barre Publishing Co. Pension Trust, 757 F.2d 52 (3rd Cir. 1985), cert. denied, 474 U.S. 843, 106 S.Ct. 130, 88 L.Ed.2d 107 (1985); Bower v. Bunker Hill Co., 675 F.Supp. 1254 (E.D. Wash. 1986) (limitations period in Section 413 of ERISA applies to suit to compel corporation to provide lifetime medical benefits to former employees); Smith v. ABS Industries, Inc., 653 F.Supp. 94 (N.D. Ohio 1986) (limitations period in Section 413 of ERISA governs action by former employees against employer to establish their rights to medical and life insurance benefits); Sparks v. Ryerson and Haynes, Inc., 638 F.Supp. 56 (E.D. Mich. 1986) (retirees' action challenging employer's change in their pension benefits governed by limitations period in Section 413).

Significantly, none of the above cases cited by petitioners deals at all with the limitations period applicable to actions to recover under a fidelity bond issued pursuant to Section 412(a) of ERISA. The lack of caselaw supporting petitioners' position and the overwhelming weight of legal authority supporting the decision of the court below, enforcing the contractual limitations period in Aetna's policy, underscores the meritlessness of the petition.

CONCLUSION

For the above reasons, this Court should decline to grant the petition for a writ of certiorari to review the order of the United States Court of Appeals for the Second Circuit in this case.

Dated: New York, New York
September 24, 1992

Respectfully submitted,

ARTHUR N. LAMBERT
Attorney for Respondents
LAMBERT & WEISS
61 Broadway, Suite 2020
New York, New York 10006
(212) 344-3100

ARTHUR N. LAMBERT
SUSAN E. JAFFEE
Of Counsel

APPENDIX

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APPENDIX A

29 C.F.R. Section 2580.412-19(c) provides, as follows:

> (c) Other bond clauses. A bond shall not be adequate to meet the requirements of section 13, if, with respect to bonding coverage required under section 13, it contains a clause, or is otherwise, in contravention of the law of the State in which it is executed.